Supreme Court, U.S.
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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1994

JEAN WILSON

Petitioner,

v.

CENTRAL FREIGHT LINES, INC.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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19 September 1994

QUESTION PRESENTED

Where a plaintiff provides summary judgment evidence in an age discrimination case that:

(a) the defendant violated its own "roll back" policy with regard to senior employees;

(b) the defendant's articulated reason (that it never rolled back managerial/salaried employees) was untrue;

(c) younger, less qualified employees were retained and transferred while plaintiff was terminated;

(d) a younger employee was hired to assume the duties remaining as a result of plaintiff's termination;

(e) a younger employee similarly situated was treated more favorably;

(f) statistical evidence showed that defendant's policies were not age neutral; and

(g) defendant discriminated against other older workers,

does plaintiff create a genuine fact issue precluding summary judgment?

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, JEAN WILSON, plaintiff-appellee, in Cause No. 93-5449, in the United States Court of Appeals for the Fifth Circuit, respectfully submits this petition for writ of certiorari to review the dismissal of her complaint against the respondent, CENTRAL FREIGHT LINES, INC., below. For clarity, references to the parties are by "Wilson" and "Central."

OPINIONS BELOW

The opinions of the U. S. District Court for the Eastern District of Texas and the unpublished Fifth Circuit opinion are attached as Appendix 1.

STATEMENT OF JURISDICTION

The district court signed a Memorandum Order granting summary judgment in favor of Central on July 2, 1993. (R 121). The Order denying Wilson's Motion to Alter or Amend was signed September 29, 1993. (R 3). Wilson timely gave notice of appeal on October 25, 1993, (R 1), and the Fifth Circuit's opinion was entered June 21, 1994. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions that must be directly construed or applied in this case.

ALLOWANCE OF WRIT

The Fifth Circuit relied on its opinion in *Bodenheimer v. PPG Industries*, 5 F.3d 955 (5th Cir. 1993), which incorrectly applied this Court's closely divided opinion in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993) (5-4), and is in direct conflict with five other Circuit Courts. *See, e.g., Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993, as amended on January 26, 1994); *Nabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993); *Hairston v. The Gainesville Sun Publishing Co.*, 9 F.2d 913 (11th Cir. 1993); *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993); and *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (3d Cir. 1993).

In the present case, the court made credibility assessments at the summary judgment stage and did not leave the question of fact -- whether the termination was motivated by age -- to the jury. The matter of which the Fifth Circuit is in conflict with the Ninth, Seventh, Eleventh, Second and Third Circuits, is what is required in order to survive a summary judgment motion. Specifically, what amount of evidence must the plaintiff produce to prove each element of her claim. For these reasons, Wilson respectfully requests that this Court grant writ and give her an opportunity for a jury. She would have been a plaintiff in any of the other five Circuits, she would have received her day in Court.

The Fifth Circuit's interpretation of this Court's *St. Mary's* opinion is in direct conflict with several other circuits. *See Barrow v. New Orleans S.S. Association*, 10 F.3d 292, 298 n. 22 (5th Cir. 1994);

Bodenheimer v. PPG Industries, 5 F.3d 955, 958-59 and n. 8; *Wilson v. Central Freight Lines*, at page 11 (*See* Appendix 1).

In addition, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE [1]

Proceedings and Results

Jurisdiction of this case was proper in Federal Court based on 28 U.S.C. §§ 1343(3) & (4). The Fifth Circuit had jurisdiction based on 28 U.S.C. § 1291.

This is a summary judgment case involving age discrimination. Wilson filed suit against Central alleging that she was discriminated against on the basis of her age. Central then moved for summary judgment alleging there was

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[1] The record in this case is composed of four volumes which will be referred to by "R" and one volume of transcription of the reporter's notes which is referred to as "TR."

no genuine issue of material fact and that it was entitled to judgment as a matter of law. The district court granted summary judgment for Central holding that there was no genuine issue of material fact for a jury to decide. Wilson timely filed a Motion to Alter or Amend which was denied. Wilson then appealed the district court's orders to the Fifth Circuit, which affirmed. Wilson now makes this petition.

Fact Statement [2]

Wilson. At the time of her termination, Wilson was 58 years old. (R 125; 226). Wilson had worked at Central for 18 years. (R 255). Initially, Wilson began working as an office clerk and then moved to cashier -- a position she held for almost five years. *Id.* Wilson then moved to the position of office

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[2] Consistent with the summary judgment posture of this case, Wilson makes the fact statement assuming all reasonable inferences in her favor as the non-movant.

manager and held that position until her discharge in August of 1990. (R 255).

At the time of her discharge, Wilson was "qualified" to assume other positions. (R 125; TR 23). Wilson instructed and trained several of the employees in the Longview terminal. (TR 5). Because she could fulfill the job duties of the other staff members, Wilson was the designated person who would fill in during vacation or sick leave of the other employees. (R 269; TR 5). The terminal manager (Mangham) testified that Wilson knew her job well, performed it excellently and that she was qualified for the other positions in the office -- specifically the cashier's job. (R 125; 299; TR 5-6). In fact, Wilson was **better qualified** than the cashier (Goode), who was in her mid-thirties when Wilson was terminated (R 125; 300).

Past Policy. Mangham requested that Wilson be rolled back from a salaried into an hourly paid job instead of being fired as this

had **always** been Central's policy. (R 298-299; 360). Mangham also asked if there was "any other way" than termination for Wilson because she was "worth keeping." (R 298; 309).

As opposed to Mangham's request, Central fired Wilson after over 18 years of service while at the same time retaining several younger, less qualified employees, including Goode. (R 285; TR 6). Wilson's separation notice indicated "not applicable" on the section of status for rehire or being transferred. (R 340; TR 6). After Wilson's termination, Mangham told her that "maybe some day he could tell her more" about why she was fired. (R 350).

Roll Back. Central concedes that it has a policy of rolling back employees based on seniority whenever there were layoffs due to business decline. (R 125; 301; 319; 370; 371). However, in the present case, Central attempted to avoid this fact by labeling

Wilson's termination as a "job abolishment" instead of a "layoff." (R 128).

Wilson's immediate supervisor testified that this was the first time in his 42 years with the company that he had experienced this type of situation. (R 265; 301; 319). The only articulated difference that Central could come up with when asked to clarify what the difference between a "layoff" and a "job abolishment" was that it would make the employee "feel better." (R 302-304). Wilson has demonstrated a genuine issue of material fact regarding the pretext of Central's position.

Different Treatment. Central's inconsistencies can be seen in looking at the Tyler terminal. Central abolished the job description of "office manager" in its Tyler terminal. (R 93; 96). However, instead of firing this office manager, Central merely rolled this employee back and reclassified her job description. (R 92; 93; 96). The office

manager in Tyler (Poole) was much younger than Wilson. (R 96). The only possible reason for the difference in treatment is the difference in age between the two employees.

Replacement. Wilson was fired and her job ***description*** ("office manager") was abolished. (R 285). All of the ***duties*** that accompanied Wilson's job description remained. (R 93; 95; 96; 112; 305). These ***duties*** were assumed by younger, less qualified employees. (R 306). In addition, Central was required to hire Ronnie Sawyer because the employees (younger than Wilson) who assumed the duties Wilson had been performing could not handle the work load. (R 93; 95; 96; 112).

In other words, instead of firing an employee in the protected age group and hiring a much younger employee to assume those exact duties, Central fired an employee in the protected age group, dispersed the ***duties*** that existed because of that employee's vacancy, and hired a much younger employee to assume

the added work load. Central did this to avoid an age discrimination claim.

Statistical Analysis. Dr. McCune, a statistician, rendered her expert opinion in an affidavit concluding that there was a disparity that adversely affected older employees that would not have existed in an age neutral policy. (R 380-391). Specifically, the result of Dr. McCune's analysis (based on reasonable statistical probability) was that Central's policies of termination in the reduction-in-force were ***not*** age neutral. (R 391).

Dr. McCune performed two Chi square analysis. (R 386; 389). Both Chi square analysis, ***if*** Central applied its policies age neutral -- which it is required to do by law -- would lead to a probability value of less than 5%. (R 386; 389). Instead, the Chi square statistical analysis revealed a 12.816% and a 17.014% probability analysis, respectively. *Id.* Both of these results were well

above where they should have fallen if Central's policies would have been conducted in an age neutral manner.

Affidavits. There are a total of seven affidavits before this Court in its *de novo* review of whether there is a genuine fact issue. Each of these affidavits are from former Central employees who worked for Central for an average of 20 years each. (R 33; 64; 68; 92; 95; 111). These affidavits were presented in Wilson's Motion to Alter or Amend the summary judgment. As the district court held, these affidavits add nothing substantially new or different to the case. (R 8). The affidavits, however, do demonstrate that no amount of evidence would have been sufficient for the district court to find a genuine issue of material fact -- the district court dismissed them as "adding nothing" to the

evidence and being "irrelevant." [3] (R 8; TR 24). The district court also stated that "there is nothing in them that I can see that has **anything** to do with this case." (TR 24).

Pelham. Marvin Pelham was employed in the Longview terminal from August of 1975 until July of 1991. His affidavit states that:

(1) Wilson was treated unfairly due to her age;

(2) A younger less qualified employee was hired (Sawyer) to do a job that Wilson was qualified for;

(3) Wilson's job description was abolished, but not her work duties -- which were assumed by younger employees (Goode, Fox, Gaither and Sawyer); and

(4) The Tyler officer manager (Poole) was a younger employee than Wilson and was treated more favorably than Wilson, although she held the same job description, which was abolished. (R 95-96).

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[3] Because this Court's review of the summary judgment is *de novo*, Wilson incorporates all the evidence that is in the record. In addition, the district court expressly held that even with the affidavits presented, Wilson can not establish a genuine fact issue.

Hennessee. Gary Hennessee was the regional manager over the Longview and Tyler terminals and was a Central employee from October of 1968 until November of 1991. (R 92). As a regional manager, Hennessee was in a position to view the "so called restructuring" of Central, which included roll backs, job reclassifications and job abolishments. *Id.* Hennessee testified that:

(1) A younger, less qualified employee (Sawyer) was hired for a job that Wilson was qualified for;

(2) A younger, less qualified employee (Gaither) moved to assume another position which Wilson was qualified for;

(3) The office manager in Tyler (Poole) was reclassified, although her job description was abolished; and

(4) He had personal knowledge of three employees (Dowell, Callens and Joe Clark) who had been rolled from a salaried position back into an hourly position in the Longview terminal. (R 92-94).

Dowell. David Dowell was an employee in the Longview terminal from 1973 until 1992. He held a salaried position (dock foreman) for

seven years and was rolled back by Central into an hourly position (truck driver). Dowell's affidavit states that:

(1) A younger, less qualified employee (Sawyer) was hired to assume a job Wilson was qualified for;

(2) Two younger, lesser qualified employees (Gaither and Anita Langley) were moved into positions in the Longview terminal that Wilson was qualified for;

(3) Three employees (Sammie Callens, Les Langley and Joe Clark) were each transferred from salaried to hourly positions both before and after Wilson's termination; and

(4) Wilson's duties were assumed by younger employees and Central intended to discriminate against Wilson based on her age. (R 111-113).

Childers. The affidavit of J. T. Childers, a Central employee, states that Wilson was terminated because of her age in August of 1990 along with:

(1) Beatrice Shook, who was a secretary terminated at age 66;

(2) Dick Vallen, who was a terminal manager terminated at 59;

(3) Neal Sutton, who was an officer manager terminated at age 64; and

(4) M. C. Cothran, who was a sales representative terminated at age 70. (R 62).

Grayson. Tom Grayson was an employee of Central from September, 1962 until November, 1991. (R 68). He was the Southern Division's operations manager from October, 1983 until November, 1991, during which time he supervised 18 terminals and 350 employees. *Id.* Grayson was in a position to see the "inconsistency" of the "so termed restructuring" which included roll backs, job classifications, and job abolishments. (R 68-69). Grayson further testified that Central's position of not rolling back salaried employees into hourly positions was a pretense that was only followed if it benefitted Central. (R 69). In addition, Grayson testified that:

(1) Tyler's assistant terminal manager (Ken Smith) had his job abolished while a younger assistant terminal manager in Waco had his job abolished and was allowed to transfer to Houston, replacing an older employee (Danny Mullins);

(2) The Houston terminal manager (Lee Schroeder) was replaced by a younger employee (Arthur Kackley);

(3) The "director of personnel" (Harriet Brown) was terminated and replaced by using a different job description -- "vice president of personnel;"

(4) The dock foreman in Paris (J. T. Childers) was terminated and not allowed to roll back; and

(5) The Longview office manager (Wilson), although "qualified," "dedicated," and "conscientious" was another "victim" of the adverse treatment of older employees. (R 68-70).

Joe Clark. Joe W. Clark was a Central employee from June, 1971 until January, 1992. (R 33). Joe Clark was a salaried employee who was allowed to roll back into an hourly position. *Id.* Joe Clark testified that:

(1) Central's roll back policy was a pretense that was only used when it was beneficial to Central; and

(2) He ultimately left because of the unfair practices toward the older employees.

Id. In addition, Joe Clark testified that the Longview terminal rolled back David Dowell and Sammie Callens. (R 34).

Larry Clark. Larry V. Clark was a Central employee from June of 1980 until February of 1992. (R 64). Clark was a sales representative in the Longview area and later the special representative in the Eastern, Northern and Northeastern Division of Central. (R 64-65). Clark testified that:

(1) Older employees were being terminated by Central across the state while Central continued to hire or reclassify younger employees;

(2) Wilson's duties were split among younger, less qualified employees and a younger employee was hired to assume the additional duties because of Wilson's termination;

(3) The Tyler office manager (Poole), who is younger than Wilson, was allowed to roll back and continue her employment;

(4) The Tyler assistant terminal manager (Ken Smith) was terminated while a younger employee (Morris) similarly situated was allowed to continue employment;

(5) Charles Lee (late 50's -- dock foreman) and Richard Vallen (57 years old and Wichita Falls assistant terminal manager) both had their jobs abolished, while at the same time Central continued to hire new, younger employees; and

(6) Because the older employees were treated so "cold blooded" by Central, Clark ultimately resigned in February of 1992.

(R 63-67). The court dismissed these compelling affidavits in their entirety as "***irrelevant***." (R 8). The court further stated that these affidavits were "insufficient to create a genuine issue of material fact." *Id.* The court reasoned that the affidavits were "remote in time" and "arose under circumstances different" than Wilson's termination. *Id.* Again, the court simply ignored the standards involved in summary judgment proceedings.

In the present case, this court is not faced with a situation where a district court has said that ***before*** summary judgment, the evidence was ***insufficient***, but ***after*** summary judgment, the evidence was ***sufficient***. Instead, the district court determined at the hearing and in its order, that the affidavits were "irrelevant" and "add nothing" to the evidence in this case. (R 8; TR 24). In

fact, the district court went so far as to say that "there is nothing in them that I can see that has anything to do with this case." (TR 24).

Wilson is not under the illusion that there was no additional evidence admitted to the court through affidavits ***after*** the summary judgment was granted. In addition, Wilson is not under the illusion that the job posting for an office manager at the Central's office was not posted until ***after*** the summary judgment was granted and the hearing was held to alter or amend the district court's judgment regarding summary judgment.

Wilson takes the position that there was sufficient summary judgment evidence ***before*** the job posting and ***before*** any affidavits were submitted to the district court. Wilson cannot argue that the job posting or the affidavits were presented to the court ***before*** it granted summary judgment in this case.

Instead, what the affidavits and the district court's findings and statements about the affidavits indicate is that ***no amount of evidence*** would have been sufficient to create a factual issue before the district court in this case. In addition, what the job posting indicates is that Central's proffered explanation for firing Wilson is a pretext for age discrimination.

There is no requirement that a non-movant in a summary judgment motion come forward with evidence that does not exist before the court grants summary judgment. As soon as the job posting was made available, it was forwarded and filed with the district court for its consideration as newly discovered evidence under Rule 59(e). The district court had this evidence to consider ***before*** it made its order regarding Wilson's motion to alter or amend. In addition, there is no requirement that a non-movant in a summary judgment proceeding come forward with every bit of possible evi-

dence that might exist in a case. Instead, the burden on the non-movant is to create a genuine issue of material fact.

In addition to demonstrating that no amount of evidence would have been sufficient for the district court to find a triable issue of fact, the affidavits and job posting also indicate that the district court abused its discretion by failing to alter or amend the summary judgment motion. The ***affidavits*** clearly indicate a genuine issue of material fact such that there would be a "manifest injustice" if the summary judgment grant was sustained. In addition, the ***job posting*** indicated "newly discovered evidence" which required the district court to amend its order granting summary judgment and deny the summary judgment motion.

There is a genuine issue of material fact in the present case. Even though trial courts are given discretion under Rule 59(e), any discretion was abused in the present case. In

holding that there was "nothing" in the affidavits that "have anything to do with" the present case, the trial court clearly abused its discretion. In addition, the newly discovered evidence of a job posting clearly indicated that the only proffered articulation by Central was a pretext for age discrimination.

In conclusion, there was sufficient evidence before the summary judgment was granted of a genuine issue of material fact and thus the district court erred in granting summary judgment. In the alternative, the trial court abused its discretion by failing to alter or amend the summary judgment motion based on the additional evidence presented by affidavits and a job posting. Thus, Wilson respectfully requests that this court reverse the trial court and remand this matter for a new trial on the merits.

In short, there was summary judgment evidence that salaried employees were rolled

back into hourly positions. This evidence, at a minimum, creates a genuine fact issue regarding Central's articulation that it was not a company policy to roll back salaried employees into hourly positions. (R 92; TR 10). There was also summary judgment evidence that: (1) three younger employees were moved into jobs in which Wilson was qualified to do; (2) that a younger employee had her position of "office manager" terminated and was rolled back; (3) statistics demonstrating that Central's policy was ***not*** age neutral; (4) evidence that a younger employee was hired to assume the duties remaining because of Wilson's termination, (5) evidence that other employees had been terminated because of age; and (6) Central had a policy of discriminating against older workers during its reduction in force. (R 34; 63-70; 95-96; 111-13; 125; 128; 201-22; 265; 301; 319; 321-25; 370; 371; TR 11).

SUMMARY OF ARGUMENT

Under the facts of the present case, there are three different ways that Wilson can demonstrate a genuine issue of material fact which precludes the granting of a summary judgment motion.

Treatment. First, under a traditional age discrimination analysis, Wilson can demonstrate a genuine issue of material fact by showing: (1) she was in the protected age group; (2) she was adversely affected; (3) she was qualified to assume the position at issue; and (4) a ***younger*** employee was ***treated more favorably***. This traditional approach can be used despite Central's label of "reduction-in-force" because Wilson was actually "replaced" because Wilson's ***duties*** were assumed by younger employees and a younger employee (Ronnie Sawyer) was hired to assume those duties.

Second, Wilson can demonstrate a genuine issue of material fact in the traditional reduction-in-force case which the Fifth Cir-

cuit set out in *Williams* by demonstrating: (1) she was in the protected age group and was adversely affected; (2) she was qualified to assume the position; and (3) there is circumstantial evidence in which a ***factfinder might*** reasonably conclude that the employer intended to discriminate in terminating Wilson. *Williams v. General Motors*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

Of course, the third factor simply requires that a factfinder could reasonably conclude either that: (1) Central consciously ***refused to consider*** retaining or ***relocating*** Wilson because of her age, **or** (2) Central regarded age as a ***negative factor*** in deciding to terminate Wilson.

Impact. Both of these first two avenues of proving an age discrimination case under ADEA would fall under a disparate "treatment" analysis. In addition, the third avenue would fall under disparate "impact" analysis. In the present case, there was statistical evi-

dence of: (1) a Chi square analysis done on both the full time/long-term employees over and under 40; and (2) a Chi square analysis on all involuntary terminations other than death.

Both of these statistical analysis were performed by an expert statistician, Dr. McCune. (R 380-90). Both Chi square analysis, ***if*** Central applied its policies age neutral -- which it is required to do by law -- would lead to a probability value of less than 5%. (R 386, 389). Instead, the Chi square statistical analysis revealed a 12.816% and a 17.014% probability analysis, respectively. *Id.* Both of these results were well above where they should have fallen if Central's policies would have been conducted in an age neutral manner.

Thus, Dr. McCune, the statistical expert, provided an affidavit to the court stating that in her expert opinion, based on her statistical analysis and reasonable statistical probability, the reduction-in-force used

by Central was ***not age neutral*** and effected employees in the protected age group such as Wilson.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT BECAUSE WILSON DEMONSTRATED A GENUINE ISSUE OF MATERIAL FACT.

> ***Grow old along with me!***
> ***The best is yet to be,***
> ***The last of life,***
> ***for which, the first was made.***
>
> *-- Robert Browning*

Thornbrough v. Columbus & Greeneville R. R. Co., 760 F.2d 633, 637 (5th Cir. 1985), citing *Rabbi Ben Ezra st. 1* (1864). The Fifth Circuit went on to say that:

> ***For many elder Americans, Browning's verse is a cruel jest rather than a reassuring vision. Not only must they face the inexorable advance of nature -- they must face the vices of their fellow man.***

Id. (emphasis added). In the present case, not only is Wilson faced with the vice of a company she dedicated over 18 years with, she has also had to face a district court that

required her to do more than establish a genuine issue of material fact in a summary judgment proceeding. Now, before this Court, Wilson makes one more plea for justice.

The present case comes to this court on the granting of a summary judgment. Before turning to the merits, Wilson sets out the procedural posture through which this court views the evidence.

Summary Judgment. Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To that end, the court must "review the facts drawing all inferences most

favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

Under FED.R.CIV.P. 56(c), Central's burden in this case is to make a "showing" that there is an absence of evidence to support the plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Any factual dispute that would affect the outcome of the suit precludes summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When determining whether to grant summary judgment, the court is merely determining whether a factual dispute ***exists***, and is ***not*** required to ***resolve*** those disputes. *Jones v. Western Geophysical Co. of America*, 669 F.2d 280, 283 (5th Cir. 1982). The fact that it appears to the court that the non-movant is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is ***not*** a valid reason to grant summary judgment. *Id.* at 283.

In reviewing a motion for summary judgment, the court must indulge in every reasonable inference from the underlying facts in favor of the party opposing the motion. *Thornbrough*, 760 F.2d 633, 640 (5th Cir. 1985); *Powers v. Nassau Development Corp.*, 753 F.2d 457, 462 (5th Cir. 1985); *American Tel. & Tel. Co. v. Delta Communications Corp.*, 590 F.2d 100, 101-02 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979). The party who defended against the motion for summary judgment (Wilson) must have her allegations taken as true and must receive the benefit of the doubt when her assertions conflict with those of the movant. *Thornbrough*, 760 F.2d at 640; *E. C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 108 (5th Cir. 1976).

Appellate Review. Of course, this Court reviews the summary judgment ***de novo*** applying the same standard used by the district court. *Western Horizontal Drilling, Inc. v. Jonnet Energy Corp.*, 11 F.3d 65, 67 (5th Cir. 1994).

In addition, this Court applies the same test that the district court applied "without reference" and "without deference" to its ultimate conclusion. *Burns-Toole v. Byrne*, No. 93-2202, 1994 WL 1289, *2 (5th Cir. Jan. 19, 1994), citing *Estate of Carter Through Taggart v. U.S.*, 921 F.2d 63, 65 (5th Cir.), *cert. denied*, 112 S.Ct. 73 (1991).

The summary judgment evidence presented before this Court in its *de novo* review sets out that: (1) other young salaried employees were rolled back into hourly positions; (2) a younger office manager was allowed to be reclassified to continue working; (3) Central's position on roll backs was a pretense that was used only when it benefitted Central; (4) a younger employee was hired to perform the duties that remained as a result of Wilson's termination; (5) statistical evidence shows that Central's policies were not age neutral; (6) younger employees were allowed to transfer while older employees were terminat-

ed; (7) Central discriminated against other elder workers; and (8) Central had a policy of discriminating against older workers during its reduction in force.

While Wilson did present enough summary judgment evidence to create a genuine issue of material fact, the district court ignored this evidence and assumed all inferences in favor of Central and granted the summary judgment.

AGE DISCRIMINATION

In 1993, the Supreme Court refined and clarified the burdens of proof in a discrimination case. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. at 2747-2749, 2751-2753 & n. 4. *See also, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-53, 101 S.Ct. 1089 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-04, 93 S.Ct. 1817, 1824-25 (1973). These burdens are:

- Plaintiff has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination;

- If the plaintiff succeeds in proving a *prima facie* case, the defendant must articulate some legitimate, nondiscriminatory reason for the employee's discharge; and
- If the defendant can articulate a nondiscriminatory reason for its adverse employment action, then the presumption raised by the *prima facie* case disappears and plaintiff must prove both that the nondiscriminatory reason was false, **and** that discrimination was the real reason.

The plaintiff can prove the third element in one of two ways, (1) directly, by persuading the court that a discriminatory reason more likely motivated the employer, or (2) indirectly, by showing that the employer's proffered explanation is unworthy of credence. The Supreme Court has stated that evidence of the falsity of an employer's proffered reason "will permit the trier-of-fact to infer the ultimate fact of intentional discrimination." *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, (1993). The necessary elements of a *prima facie* employment discrimination case are "not Platonic forms, pure and unchanging; rather, they vary depending on the facts of a

particular case." *Thornbrough*, 760 F.2d at 641. However, Plaintiff's ultimate burden of proving intentional age discrimination remains with him at all times and never shifts to defendant. *St. Mary's*, at 2747-48; *Odom v. Frank*, 3 F.3d 839, 850 (5th Cir. 1993).

Wilson is not trying to stretch the parameters of the ADEA or create any new law. Instead, Wilson demonstrates to this court that her case falls squarely within the ADEA's jurisprudence -- which was simply misapplied by the district court.

Disparate treatment among allegedly similar situated employees appears on the face of the record in the present case as it did in *Thornbrough*, 760 F.2d 633 (5th Cir. 1985). Faced with the summary judgment record before this Court, there is sufficient evidence that a reasonable jury could return a verdict of age discrimination.

A. Wilson's duties were assumed by younger employees and younger employees were treated more favorably than Wilson.

It is undisputed that not only was Wilson qualified for several of the positions, but that she was ***better*** qualified. (R 246; 269; 299; 309; 340). This is not a case such as *Amburgey*, where the only evidence that the Plaintiff was better qualified than a younger, retained individual, is in a self-serving affidavit. *Amburgey v. Cohart Refractories Corp., Inc.*, 936 F.2d 805 (5th Cir. 1991). Instead, the present case is like *Walther*, where the plaintiff's immediate supervisor conceded that she was more qualified than some of the younger employees who were retained. *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992).

While it is true that an employer is not required to "bump the younger employees from their incumbent positions to make room for the older employees," when a "***new position***" is open because of the termination, the older employees should be considered for that position. *Id.*; *See also, Barnes v. GenCorp Inc.*,

896 F.2d 1457, 1469 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990). If an older, terminated employee establishes that such vacancies were filled by younger, less qualified transfers, this is at least some evidence that age discrimination has occurred. *Id.*

In the present case, Central marked "not applicable" on Wilson's termination papers under the section of eligible for rehire while younger, less qualified employees were retained and transferred to the same office. (R 340). Moreover, in *Walther*, the court held that in a "reduction-in-force" situation, the critical comparison is not between the plaintiff and his replacement, but between the plaintiff and similarly situated younger employees. In the present case, younger, less qualified employees were retained and transferred while Wilson was not even considered for roll back or rehire. Thus, there is a fact issue in this case.

The summary judgment evidence demonstrates that Mildred Poole, the Tyler office manager, had her job description (office manager) abolished, but was allowed to be rolled back and assume a lesser position and continue working. The Fifth Circuit has also indicated that evidence that others similarly situated were not discharged is evidence of age discrimination. *See Elliott*, 714 F.2d at 567.

In the present case, there is evidence that Wilson was "replaced" by a younger employee -- Ronnie Sawyer. While it is true that Mr. Sawyer was not hired as an office manager, the necessity of hiring him was a direct result of firing Wilson.

Instead of firing Wilson and hiring Sawyer, Central (in order to avoid an ADEA claim) fired Wilson, delegated her duties to younger employees and then hired Sawyer to assume the additional work load. Such a sham exalts form over substance and should not be

allowed to circumvent an age discrimination claim.

B. *Wilson can demonstrate a genuine issue of material fact in a reduction-in-force case because she was "more qualified" than younger employees who were retained or transferred, and Central's articulation was a pretext for discrimination.*

As the Fifth Circuit noted in *Williams v. General Motors Corp.*, reduction-in-force cases are obviously outside the embrace of the *McDonald Douglas* framework since the reduction-in-force plaintiffs are simply laid off and incapable of proving "replacement" by a younger employee. 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). Even in the absence of a one for one replacement of an older employee by a younger one, an employer can, with marked facility, practice age discrimination in a reduction-in-force scenario. *Id.*

There is no requirement -- even in the *Williams* reduction-in-force scenario -- that the test be adhered to rigidly. Indeed,

discrimination exists, to be sure, "in forms as myriad as the creative perverseness of human beings can provide." *Williams*, at 128, citing *McCorstin v. U. S. Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980). The requirements for reduction-in-force case are "not etched in granite and they do not beckon fanatic adherence." *Williams*, at 129, n. 12; *Sherrod v. Sears Roebuck & Co.*, 785 F.2d 1312, 1314, n. 5 (5th Cir. 1986).

The case before this Court is no different than *Thornbrough* where the plaintiff's duties were assumed in part by younger employees who were retained despite an elder employee who was better qualified for the position. Wilson was treated just as the plaintiffs in *Thornbrough*, *Amburgey* and *Walther*. The plaintiff's position was entirely abolished and some of the duties were transferred to younger employees. As such, the comparison needs to be made between the terminated employee and the retained employee and whether there was a

vacant position created because of the reorganization. In the present case, all of these issues lead to the conclusion that Wilson was discriminated against because of her age.

In a reduction-in-force situation, a plaintiff must show that:

- The plaintiff is within the protected age group and was discharged or demoted by defendant's employment decision;
- The plaintiff was qualified to assume another position at the time of the discharge or demotion; and
- The plaintiff produced evidence, circumstantial or direct, from which the trier of fact might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

Williams, 656 F.2d at 130 n. 17; *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 812 (5th Cir. 1991); *Thornbrough*, 760 F.2d at 633.

The third element of this test requires evidence from which a jury could conclude either that (1) defendant consciously refused to consider retaining a plaintiff because of

age; or (2) defendant regarded age as a negative factor in such consideration.

As a preliminary matter, Central does not dispute that Wilson has established the first two elements of her *prima facie* case. At age 58, at the time of her termination, Wilson was clearly within the protected age group, and she was adversely affected by her termination. Furthermore, she was clearly qualified to assume another position at the time of her discharge. In fact, the Terminal Manager, Weldon Mangham, stated that the plaintiff was "very good" at performing the cashier's job which was not eliminated during the reduction-in-force. (R 300).

The fact issues are whether Wilson has established element three of the *prima facie* case and whether she has demonstrated that Central's stated reason for her termination was mere pretext. Not surprisingly, there is no direct evidence of age discrimination in this case. Therefore, in order to establish

element three of her *prima facie* case, Wilson must come forth with circumstantial evidence from which a factfinder ***might reasonably conclude*** that the employer intended to discriminate in reaching the decision. *Thornbrough*, 760 F.2d at 642. (emphasis added).

In the present case, the district court held in its summary judgment motion that Wilson had not established a *prima facie* case. (R 132). This holding runs contrary to the requirements of demonstrating a genuine fact issue regarding a *prima facie* age discrimination case. In order to establish a *prima facie* case, a plaintiff "need only make a very ***minimal*** showing." *Thornbrough*, 670 F.2d 967 (5th Cir. 1984); *Guthrie v. TIFCO Ind.*, 941 F.2d at 377 (emphasis added).

Wilson is not under the illusion that a mere subject belief of age discrimination is enough to meet the *prima facia* elements of an ADEA claim. More is required than a self-serving conclusory allegation of age discrimi-

nation. *See E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d at 639. However, it does "not require much more . . . only that a plaintiff present some evidence of differential treatment between older and younger employees." *Thornbrough*, 760 F.2d at 645.

In fact, Wilson only need show that (1) she was within her protected class, (2) she was qualified for the job in question, and (3) an employee outside of the protected class was treated more favorably. *Thornbrough*, 760 F.2d at 639. In the present case, Wilson did just that. The district court had deposition evidence from Mangum and Wilson that there was a roll back policy and that Wilson was more qualified for the cashier's job that was retained by Goode, an employee in her mid-thirties.

"[A]ny type of circumstantial evidence that younger employees were more favorably treated than older employees" will allow Wilson to establish her *prima facie* case. *Id.*

at 643 (emphasis added) (construing *Williams v. General Motors Corp.*, 656 F.2d at 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). The facts of this case are somewhat similar to the facts of *Thornbrough* and *Amburgey* in which the plaintiffs were determined to have made out *prima facie* cases. Wilson was in the protected age group and was adversely affected by her termination like the plaintiffs in *Thornbrough* and *Amburgey*. In addition, like *Thornbrough* and *Amburgey*, Wilson presents evidence that she was dismissed while younger, allegedly less qualified persons were retained.

Any type of circumstantial evidence that younger employees are more favorably treated than older employees to allow a plaintiff to establish a *prima facie* case. In the present case, there is substantial evidence before this Court in its *de novo* review that creates a genuine fact issue that requires denial of the summary judgment stage The tragedy of

the present case is that Wilson can support her claim of age discrimination with more evidence than *Thornbrough* and instead of denying the summary judgment, the district court granted it in its entirety.

The "only evidence" to support *Thornbrough*'s claim was that younger, allegedly less-qualified employees were retained during the reduction-in-force and that at the time of his discharge, younger, allegedly less qualified employees were hired. *Thornbrough*, 760 F.2d at 643. The Fifth Circuit stated that these allegations "limited though they are, are sufficient to support a *prima facie* case." In the present case, Wilson presented this type of evidence and statistical evidence from an expert stating that Central's policies were not age neutral and evidence of pretext. Yet, the district court granted summary judgment on the grounds that Wilson did not even meet a minimal showing of a *prima facia* case.

In addition, like *Amburgey*, Wilson can meet the minimal standards to create a fact issue regarding the *prima facia* case. But Wilson can do more than the plaintiff in *Amburgey*. The plaintiff offered no evidence that he was more qualified than the younger employees who were retained by Central. Indeed, even Wilson's immediate supervisor concedes that she trained the younger retained employees and had 18 years more experience than the newly hired, younger Sawyer.

What the Fifth Circuit focused on in *Thornbrough* is the question of why, when there is a discharge, it was of an older employee rather than a younger one. *Id.* at 644. In *Little v. Republic Refining Co.*, the Fifth Circuit stated that the fact that plaintiff was replaced by someone outside the protected age group was sufficient to establish a *prima facie* case. 924 F.2d 93 (5th Cir. 1991). It is undisputed that such evidence occurred in

the present case, and yet the district court granted Central's summary judgment.

In fact, the district court even recognized that "any type of circumstantial evidence that younger employees were more favorably treated than older employees will allow Wilson to establish her *prima facie* case." (R. 126). Wilson had given such testimony. Yet, the district court granted the summary judgment. Central argued that only "layoffs" involved the roll back policy, and that Wilson was not laid off -- but instead had her position "eliminated." The district court disregarded Wilson's evidence and assumed the truth of Central's position. Thus, the district court misconstrued the requirements of FED.R.CIV.P. 56(c) and presumed any factual disputes in favor of Central (the movant) instead of Wilson (the non-movant).

Roll Back. In addition to creating a genuine fact issue regarding the *prima facia* case, Wilson has created a genuine issue of

material fact regarding the pretext of Central's roll back policy. Central's position on roll back policy has continued to change throughout the summary judgment proceedings.

Position One: We <u>never</u> "roll back."

Defendant's initial position in this case was that Wilson was not "rolled back" into an hourly position from her salaried position instead of being terminated because Central never rolled back salaried employees to hourly positions. (R 14). This position was echoed under oath repeatedly and in the depositions taken in this case. (R 14; 15). William Woody Callen, Jr., Frances Callen and Tom Clowe each took this position. (R 15). Wilson produced evidence that such a position was simply not true.

Position Two: Okay, we "roll back," but only salaried non-supervisory employees.

Central's counsel argued to the district court in the court's hearing on Wilson's Motion to Alter or Amend that even though

Central's position previously presented was that Central never "rolled back" salaried employees, they really meant that they never rolled back salaried supervisory employees, but did roll back salaried non-supervisory employees. The court asked the parties to submit briefs to clarify this position that Central had taken for the first time in this hearing. (R 15).

Positions of Time, but Okay, in 1990 back

In Central's post-hearing brief, apparently unable to explain to the court the distinction previously offered, and seeing that their attempts at deception had been revealed, took yet a third position. That third position is that Central's company policy was to allow roll backs in years prior to 1990 and in years since 1990, but during the time of Wilson's termination, roll backs were not allowed. (R 16). Central's policy cannot be three ways. Such a waffling of positions demonstrates a genuine issue of

material fact in the present case regarding Central's alleged articulated reason for treating Wilson differently than they had other employees under company policy.

Posting. In addition, Wilson has attached a copy of two postings for an "office supervisor" in the Longview terminal. (*See* Appendix 2). The first was posted immediately after the district court granted the summary judgment motion. The second was posted immediately after the Fifth Circuit's affirmance. This posting demonstrates that Central's argument that there were fewer employees to be supervised, and thus there was no need for an officer manager, is a pretext for age discrimination. At the time of this posting, which was sent under an anonymous cover to Wilson, there were the same number of employees as there were at the time of Wilson's termination. Such evidence further demonstrates that Central will go to any length to avoid the

truth that they discriminated against Wilson on the basis of her age.

Wilson respectfully requests that this court appropriately apply Rule 56(c) which requires taking the evidence in a light most favorable to Wilson, the non-movant. *See Richardson v. Oldham*, No. 93-4140, 1994 WL 7150, *2 (5th Cir. Jan. 28, 1994). In *Mills v. Davis Oil Co.*, the court stated "determination of whether there exists genuine issues of material fact, although considered *de novo*, requires deference to [Wilson], the non-moving party." No. 92-5006, 1994 WL 2268, *2 (5th Cir. Jan. 21, 1994), citing *Jones v. Southern Marine and Aviation Underwriters*, 888 F.2d 550, 560 (5th Cir. 1989).

In order to show that Central's proffered explanations are pretext, Wilson need only show that age "more likely motivated" Central's decision. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1505 (5th Cir. 1988). "In the context of a summary judgment

proceeding, the question is not whether the plaintiff proves pretext, but whether the plaintiff raises a genuine issue of fact regarding pretext." *Thornbrough*, 760 F.2d at 646; *See also, Connell v. Bank of Boston*, 924 F.2d 1169 (1st Cir. 1991).

In addition, the Fifth Circuit has stated that evidence of the falsity of an employer's proffered reason "will permit the trier-of-fact to infer the ultimate fact of intentional discrimination." *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). At the summary judgment stage, Wilson offered evidence that there was a seniority roll back policy, that this policy was applied when business declined and there were job terminations, that a younger employee was treated more favorably than Wilson in a job in which Wilson was clearly more qualified and, in fact trained the younger employee, and there is statistical evidence that the policies carried out by Central

were not age neutral. These disputed factual issues are clearly material.

Giving deference to the factfinder in cases which involve such nebulous issues of intent is preferred as opposed to the injustice that occurred in the present case and in any case in which there is a genuine issue of material fact and the court grants a summary judgment. The Fifth Circuit stated that:

> Given the difficulties of demonstrating age discrimination, we believe that the better course is to allow the ***factfinder*** to determine whether the plaintiff's evidence justifies an inference of age discrimination.

Thornbrough, 760 F.2d at 647 (emphasis added). Wilson respectfully requests that this court, as the Fifth Circuit did in *Thornbrough*, perceive a thin vapor in the evidence that is before this Court and leave the question of whether these vapors will "precipitate into a victorious shower" to the ***jury*** where they belong. *Id.* at 648.

In addition to ignoring the roll back policy and the younger employee who was allowed to continue instead of Wilson, the court also ignored summary judgment evidence in Mangham's deposition that younger employees assumed the duties of Wilson. (R 306). The court ignored this evidence and somehow concluded that Mangham assumed Wilson's duties. (R 127). In addition, the court ignored summary judgment evidence that these younger employees were less qualified than Wilson. *Id.* And finally, the district court ignored the substance and got lost in the form of the difference in the labels of "laying off" and "job abolishment." (R 127-29).

In truth, there is summary judgment evidence that creates a genuine issue of material fact regarding whether Wilson's "job abolishment" was in fact a pretext for a layoff -- which Central concedes invoked the seniority roll back policy. In fact, Mangham testified in summary judgment evidence that

the only difference between a layoff and a job abolishment is that the later makes the fired employee "feel better." (R 302-04). The only difference between a layoff and a job abolishment is that Central chose to use the term job abolishment in order to avoid an age discrimination act when it clearly discriminated against an older employee.

C. Wilson can demonstrate a genuine issue of material fact regarding age discrimination based on the expert opinion of Dr. McCune's statistical analysis.

In addition to the fact issue raised regarding pretext and the *prima facia* case, there was adequate statistical evidence before the District Court to create a genuine issue of material fact. Wilson offered statistical evidence in the form of an affidavit of Dr. McCune. It was Dr. McCune's opinion that Central's termination decisions in 1990, were ***not*** age neutral and adversely impacted employee's age 40 years or older. (R 129). The court disregarded this testimony and assumed

as true the positions taken by Central in regard to the statistical evidence.

First, the court relied on Central's representation that the Fifth Circuit's opinion in *Lopez v. Labors International Union Local # 18*, 987 F.2d 1210, 1214 (5th Cir. 1993), required a relevant labor pool that Dr. McCune had not used. When viewed properly, *Lopez* supports Dr. McCune's position, rather than hindering it. *Lopez* clearly states that the "starting point . . . must be . . . probability of members of the suspect classes being employed in a particular position." *Id.* The ***position sought*** is a relevant variable that needs to be considered in a ***hiring*** case; just as in the present case, the ***employment status*** of the ***terminated*** employees should be considered. Neither the district court, nor Central understand this.

What the district court failed to recognize is that *Lopez* is a ***hiring*** case rather than a ***termination*** case. The district court

erroneously relied on the entire work force of Central in 1990 and looked at the employees who had terminated based on those percentages. This position is flawed because it (1) includes terminations as a result of death, (2) does not separate terminations that were "employee induced" (such as misconduct, absenteeism, etc.) and those that were "initiated by Central" (such as reduction-in-force), (3) does not differentiate between voluntary and involuntary terminations, (4) does not differentiate between full-time and part-time employees, (5) does not consider the serious concerns expressed by Dr. McCune about the reliability of the incomplete data that Central provided after several motions to compel (several of the employees falling under voluntary resignation were not signed by the employees (R 210-11), and (6) did not take into account the seniority of the terminated employees which was at issue in the present case

because of Central's roll back policy based on seniority.

Second, the court erred in stating that "there is no comparison to the total number of employees terminated as a result of the reduction-in-force." (R 131). This statement is untrue. Finally, the court erred in stating that Dr. McCune's statistical comparisons "which arbitrarily classify employees according to the years of employment and part time or full time status with Central" were not persuasive and simply skewed the statistical analysis. (R 131). This position is also untrue.

Category. The category in which a termination falls is a relevant factor in Dr. McCune's analysis. For example, if one were simply to take the raw total number of employees over 40 and those under 40, they would not even separate out those employees who were classified as terminated because of ***death***. Surely, this court can see that such an analy-

sis would skew the ***relevant*** evidence in deciding a claim. In the present case, as in *Thornbrough* and *Walther*, the statistics on a superficial level tend to indicate the opposite of age discrimination. However, like *Thornbrough* and *Walther*, the ***relevant*** statistics indicate age discrimination. In addition, in all three cases there is additional evidence of such discrimination -- in the present case, more than the two cited.

Employment Status. In addition, employment status is a relevant factor to consider under the statistical analysis of the present case. Of the 188 terminated employees over the age of 40, 78.2% were full time, while of the employees under age 40, only 38% were full time. (R 411-44). Central should not be able to pierce the shield that the ADEA provides to elderly Americans on the basis that they laid off a significantly higher portion of young ***part time*** employees. In the present case, only 5.3% of employees over 40 years old were

part time, while 46.3% of employees under 40 were part time. *Id.* In addition, 1990 separation notices were given for 26 full time employees over the age of 40, while only 7 were given to full time employees under the age of 40. *Id.*

Unreliable Data. The court also ignored Dr. McCune's expressions of concern involving the reliability of data. There were 44 separation notices that were termed "voluntary" but did not have signatures. The resolution of how these terminations should be characterized is very relevant to the analysis of the termination data. (R 210-11). If the 44 disputed unsigned separation notices are put into the pool of 1990 terminations for reduction in force, the result is that 61.8% are full time employees over 40 years old, while only 22.4% were full time and under 40 years old. (R 210-11; 411-44).

Disciplinary Statistics. The court's assertion that Dr. McCune's analysis compared

terminations due to a reduction-in-force or end of assignment with terminations for disciplinary reasons is incorrect. The comparisons were made between ***age*** categories, ***not*** strictly between the two ***termination*** categories. (R 209). At no time in the aforementioned analysis did Dr. McCune strictly compare terminations for reduction-in-force with terminations for disciplinary reasons. The statistical analysis tended to indicate that the impact on the two age groups was disproportionate. Even a casual observer can see that terminations for disciplinary reasons are induced by the ***employee*** while terminations for reduction-in-force are initiated by ***Central*** -- in some cases, without the employee being given advance notice.

Seniority. It is true that the ADEA does not impose upon employers a duty to give special treatment to those in the protected class. In other words, there is no seniority system set up by the ADEA. However, in the

present case, there was a factual dispute as to Central's seniority roll back policy during layoffs. Central concedes that it had a policy of rolling back senior employees during layoffs. (R 370; 371). Central further concedes that they did not treat Wilson as they had treated other employees in this regard such as Mildred Poole, the Tyler office manager. Central tries to avoid this fact by labeling the layoff of Wilson as a "job elimination" and not a layoff. (R 265; 301; 319). This argument is a pretense for age discrimination.

Because seniority was an issue before the district court, Dr. McCune considered the length of time the employees had worked for Central. To do otherwise would be to hold to the belief that employees who have an average of over 20 years of service with Central should be treated in the same regard as part-time employees with less than one year of service with Central.

Without taking any of the relevant considerations under the facts of the present case as required by the Fifth Circuit in *Lopez* and *Thornbrough*, the district court dismissed the statistics because it did not understand them. Even if this court views all the evidence in the present case as not being enough to create an inference that Central discriminated against Wilson, that is not the question before this Court. The only question before this Court is whether all the evidence set out in the preceding pages meets the minimal standard to create a genuine fact issue to preclude a summary judgment and allow a plaintiff claiming age discrimination to at least have her case heard by 12 of her peers. To do otherwise is an injustice.

For these reasons, Wilson respectfully requests that this court reverse the district court's grant of summary judgment and remand this case for a full trial on the merits. As this court reviews a summary judgment motion

of a district court ***de novo***, it is entitled to review all the evidence that the district court had before it when deciding whether to grant the summary judgment motion. Because there are three different avenues where Wilson can demonstrate a genuine issue of material fact as to age discrimination, Wilson respectfully requests that this court reverse the grant of summary judgment and remand this case for a trial on the merits.

CONCLUSION

For the reasons stated, the Supreme Court of the United States should reverse the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case for trial on the merits and grant such further relief as is just.

Respectfully submitted,

Counsel for Petitioner

APPENDIX

APPENDIX

Appendix 1 Opinions A-1

Appendix 2 Office Memorandums A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

JEAN WILSON	§	
	§	
V.	§	NO. 2:91-CV-172
	§	
CENTRAL FREIGHT LINES, INC.	§	
	§	

MEMORANDUM ORDER

Pending before the Court is the Defendant Central Freight Lines, Inc.'s Motion for Summary Judgment in the above-styled cause of action. After careful consideration of the motion, the response and the reply thereto, the Court finds that the motion is well taken.

I. BACKGROUND

The plaintiff Jean Wilson alleges that she was terminated in August 1990 from her position as Office Manager of the defendant Central Freight's Longview, Texas terminal on the basis of her age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Wilson, age fifty-eight at the time of her discharge, also brings a

pendent state claim for intentional infliction of emotional distress.

Central Freight denies that Wilson's age played any role in the termination decision. Central Freight contends that Wilson was terminated because the position of Office Manager was eliminated, and her duties were assumed by other employees as part of a company-wide restructuring necessitated by an economic downturn.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the record discloses that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the motion is made and properly supported, an

adverse party may not rest on allegations or denials but must set forth specific and supported material facts. Fed. R. Civ. P. 56(e). Therefore, the nonmovant must bring forth significant probative evidence to prevent summary judgment. Union Planters Nat'l Leasing Inc. v. Woods, 687 F.2d 117 (5th Cir. 1982). To that end, the Court must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists, and is not required to resolve those disputes. Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982). The fact that it appears to the Court that the nonmovant is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a valid reason to grant summary judgment Id. at 283.

Additionally, a motion for summary judgment cannot be granted simply because there is no opposition. Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985). The movant has the burden of establishing the absence of a genuine issue of material fact, and, unless he has done so, the court may not grant the motion, regardless of whether any response was filed. Id.

III. DISCUSSION

Central Freight moves this Court to grant summary judgment as to the plaintiff's claims for age discrimination and intentional infliction of emotional distress. In her response to the motion, Wilson strenuously objects to summary judgment of the ADEA claim; however, Wilson does not address the motion as it applies to her claim for intentional infliction of emotional distress.

A. ADEA CLAIM

Central Freight seeks summary judgment of Wilson's age discrimination claims on the

grounds that she has failed to establish the elements of her *prima facie* case and that she has failed to demonstrate that Central Freight's stated reason for eliminating her position was actually a pretext for age discrimination.

Because this is a reduction-in-force ("RIF") case, the legal requirements for making out a *prima facie* case are slightly different than the requirements in the typical termination case. The standard articulated by the Fifth Circuit for RIF cases requires the plaintiff to show: (1) that she is within the protected age group and that she has been adversely affected -- e.g. discharged or demoted by the employer's decisions; (2) that she was qualified to assume another position at the time of the discharge or demotion; and (3) evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d

805, 812 (5th Cir. 1991) (*quoting* Thornbrough v. Columbus and Greenville R. R. Co., 760 F.2d 633 (5th Cir. 1985)).

The third factor requires that the plaintiff "must produce some evidence that an employer has not treated age neutrally.... Specifically, the evidence must lead the factfinder to reasonably conclude either (1) the defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) that defendant regarded age as a negative factor in such consideration." Id.

After establishing a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its decision. Thornbrough, 760 F.2d at 639. By articulating legitimate reasons for the decision, the employer rebuts the initial presumption of intentional discrimination created by the plaintiff's *prima facie* case. The burden of production then shifts back to the plaintiff to prove that the reasons articulated by the employer are merely

pretexts for the true reasons behind the termination decision. Id. The plaintiff can do this in one of two ways, "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." Id.

Central Freight argues that it is entitled to summary judgment of Wilson's age discrimination claim because Wilson has not established a *prima facie* case nor has she met her burden of production to prove that the reasons articulated by Central Freight are merely pretexts for the true reason behind her termination decision.

As a preliminary matter, Central Freight does not dispute that Wilson has established the first two elements of her *prima facie* case. At age fifty-eight at the time of her termination, Wilson was clearly within protected age group, and she was obviously adversely affected by her termination. Further-

more, she was clearly qualified to assume another position at the time of her discharge. In fact, the Terminal Manager Weldon Mangham stated that the plaintiff was "very good" at performing the cashier's job which was not eliminated during the RIF.[1] Dep. of Weldon Mangham at 44.

It is also undisputed that Central Freight has articulated a legitimate, nondiscriminatory reason for terminating Wilson's employment. Wilson conceded in her deposition that Central Freight's business had declined in the time prior to her termination. See Dep. of Jean Wilson at 72. Wilson also conceded that there were fewer employees in the Longview terminal at the time of her termination than there had been in past years. Id.

The parties strongly contest whether Wilson has established element three of the

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[1] At the time of Wilson's termination, Nancy Goode, who was in her mid-thirties, was employed as the cashier and had been so employed for over three years. Goode remains the cashier in the Longview terminal.

prima facie case and whether she has demonstrated that Central Freight's stated reason for her termination was mere pretext.

Not surprisingly, there is no direct evidence of age discrimination in this case.[2] Therefore, in order to establish element three of her *prima facie* case, Wilson must come forth with circumstantial evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision. Thornbrough, 760 F.2d at 642. "[A]ny type of circumstantial evidence that younger employees were more favorably treated than older employees" will allow Wilson to establish her *prima facie* case. *Id.* at 643 (construing Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)).

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[2] Discussing the usual lack of any direct evidence of intentional discrimination, Judge Goldberg remarked, "Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree." Thornbrough, 769 F.2d at 638.

The facts of this case are somewhat similar to the facts of Thornbrough and Amburgey in which the plaintiffs were determined to have made out *prima facie* cases. Wilson was in the protected age group and was adversely affected by her termination like the plaintiffs in Thornbrough and Amburgey. However, unlike Thornbrough and Amburgey, Wilson presents no evidence that she was dismissed while younger, allegedly less qualified persons were retained.[3] Wilson's position was completely eliminated by Central Freight. Her former duties as Office Manager were divided up and assumed by two other employees, both of whom had been employed by Central Freight in the Longview terminal years prior to Wilson's

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[3] In Thornbrough, the plaintiff presented evidence that not only were allegedly less well-qualified employees retained during the RIF, but also that at the time of his termination, two younger, allegedly less well-qualified employees were hired. 706 F.2d at 643. Similarly, in Amburgey, the plaintiff presented evidence that he was dismissed while younger allegedly less qualified persons were retained. 936 F.2d at 813.

termination.[4] Wilson does not allege that new employees were hired to assume her duties. Nor does she allege that the employees who assumed her duties were less qualified than she. Furthermore, the job for which she argues she was qualified--the cashier's position--was not open when she was terminated.

In response to the motion, Wilson presents two types of evidence in an effort to persuade the Court that there are genuine issues of material fact. First, Wilson asserts that Central Freight's past policy for dealing with business declines was to lay off employees based on seniority. According to the plaintiff, this policy was implemented by laying off the employee with less seniority while the employee with more seniority was "rolled back" into the less senior employee's position. See Pl.'s Resp. at 8. Wilson

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[4] Weldon Mangham, who was older than Wilson, also assumed some of her responsibilities; however, he retired approximately four months after the decision was made to terminate Wilson.

further argues that she should have been "rolled back" into the cashier's position. In support of her position, Wilson points to the deposition of Weldon Mangham. While Mangham states that layoffs were based on seniority, Wilson was not laid off. Her position was totally eliminated, a fact acknowledged by Mr. Mangham, and, therefore, not subject to a roll-back policy.[5] As further explained by the President and CEO of Central Freight, Thomas Clowe, Jr., the policy of layoffs by seniority only applies by job classification to hourly employees, not to management and salaried employees. Dep. of Thomas Clowe at 24-25. As additional evidence that she was not the beneficiary of Central Freight's roll-back policy due to her age, Wilson states that

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[5] Mangham testified:

> It really wasn't a change in policy. They still go by seniority on layoffs, but this was my first experience with abolishing or eliminating positions and abolishing that position.

Dep. of Weldon Mangham at 46-47.

"the Defendant admitted that in other situations they had transferred salaried or managerial employees to hourly positions." Pl.'s Resp. at 2. The admission to which Wilson refers is Defendant's Response to Plaintiff's Requests for Admissions No. 1 wherein Central Freight states that in 1991, the year after Wilson's termination, two employees were transferred pursuant to a new transfer policy which was implemented in 1991. The Court does not find these two instances relevant to the plaintiff's claims as they occurred several months, if not longer, after her termination, and they occurred pursuant to a transfer policy, not a layoff or RIF policy, which was not implemented well after the decision to terminate her position was made.

The Court is not persuaded that Central Freight's policy of laying off hourly employees on the basis of seniority creates a genuine issue of material fact that Wilson, a salaried Office Manager whose position was eliminated, was terminated on the basis of her

age. Nor is the Court persuaded by Wilson's argument that because she was qualified to be a cashier, Central Freight should have terminated the cashier and given the position to Wilson.[6]

To support her claim of age discrimination, Wilson also offers statistical evidence in the form of the Affidavit of Dr. Sandra McCune, an Assistant Professor in Secondary Education. Based on her statistical analysis, Dr. McCune opines that Central Freight's termination decisions in 1990 "were not age neutral and adversely impacted employees age 40 years or older." (emphasis in original) Aff. of Sandra Luna McCune, Ph.D. at 12. In

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[6] The law does not require an employer to bump an incumbent from her job because an older employee's position is eliminated. See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1422 (9th Cir. 1990); Simpson v. Midland Ross Corp., 823 F.2d 937, 942 (6th Cir. 1987) (employer under no duty to transfer employee when it reduces work force for economic reasons); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1217 (7th Cir. 1989) (ADEA does not mandate that employer bump younger employees, nor was it intended to legislate seniority rights where none exist).

its Reply, Central Freight argues that there are numerous defects in Dr. McCune's analysis and that a proper statistical analysis would reveal that there was no age selection bias.

The starting point for a statistical analysis of possible adverse impact is a calculation of the percentage of those employees age forty and older in the relevant labor pool. See Lopez v. Laborers Int'l Union Local No. 18, 987 F.2d 1210, 1214 (5th Cir. 1993). Central Freight criticizes Dr. McCune's statistical analysis because it did not include an examination of the percentage of protected employees in the labor pool. However, in her deposition, Dr. McCune calculated the applicable percentages and found that in 1990 people under the age of forty represented approximately 58% of the work force while people age forty and older represented approximately 42% of the work force. Dep. of McCune at 63. Dr. McCune further conceded that the statistical breakdown of the employees discharged during the reduction in force demon-

strated that persons under age forty represented 64.1% of the total number terminated while persons age 40 and older represented only 35.9% of the employees discharged. Dep. of McCune at 64-65. Thus, while employees within the protected class composed approximately 42% of the defendant's labor force in 1990, they represented only approximately 36% of the employees terminated as a result of the reduction in force. The Court finds that these numbers do not reveal any bias or discrimination against employees over the age of forty. If anything, the numbers could suggest a bias against those employees under age forty.

Central Freight also criticizes the comparisons relied on by Dr. McCune in reaching her opinion. First, Dr. McCune compares employees terminated in the RIF with those terminated for disciplinary reasons. Aff. of McCune at 4-7. Her analysis reveals that of the 53 employees age forty and over which were involuntarily terminated by Central Freight in 1990 roughly 53% of those were terminated in

the RIF while the remaining 47% were terminated for disciplinary reasons. For the 187 employees under age forty, her analysis showed that approximately 27% were terminated based on the RIF while the remaining 73% were terminated for disciplinary reasons. Aff. of McCune at 5. On the basis of these percentages, Dr. McCune concluded that Central Freight's termination decisions adversely impacted older employees. Id. at 7.

The Court fails to see the relevance of Dr. McCune's percentages and resulting conclusion because there is no comparison to the total number of employees terminated as a result of the RIF. As demonstrated above, such a comparison revealed that older employees comprised a much smaller percentage of the total terminated during the RIF than did younger employees. The Court finds that Dr. McCune's comparisons of termination reasons within age groups are not helpful in determining whether employees over age forty were disproportionately affected.

Similarly, the Court does not find persuasive Dr. McCune's second comparison which arbitrarily classified employees according to their years of employment and part-time or full-time status with Central Freight. These classifications appear to simply skew the statistical analysis.

Based on a careful examination of the two categories of evidence proffered by Wilson, the Court concludes that the plaintiff has failed to raise a genuine issue of material fact as to the existence of a *prima facie* case. Neither her layoff policy argument nor her proffered statistical evidence raises a genuine issue of material fact from which a factfinder might reasonably conclude that Central Freight intended to discriminate in reaching the decision to eliminate her position.

While the Court has concluded that Wilson has failed to create a genuine issue of material fact with regard to her *prima facie* case and could end its analysis at this point, the

Court will, nevertheless, address Central Freight's argument that Wilson has not created a fact issue sufficient to overcome summary judgment on the issue of pretext. To establish pretext, Wilson must show either (1) that a discriminatory reason motivated Central Freight or (2) that Central Freight's stated reason is unworthy of credence. Thornbrough, 760 F.2d at 639; see also Hanchey v. Energas Co., 925 F.2d 96, 98 (5th Cir. 1990). Hanchey stated that the second method "must extend beyond casting doubt on the reasonableness of the employer's action...." 925 F.2d at 98.

On the pretext issue, Wilson submits essentially the same evidence submitted to establish her *prima facie* case. The Court has discussed the plaintiff's proffered evidence in detail above and concluded that it was insufficient to create a genuine issue of material fact with regard to plaintiff's *prima facie* case. For the same reasons, the Court finds that Wilson's evidence neither creates a fact issue as to whether discriminatory rea-

sons motivated Central Freight nor does it create a fact issue as to whether Central Freight's proffered reason is unworthy of credence.

B. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM**

Central Freight also seeks summary judgment of Wilson's claim for intentional infliction of emotional distress. As noted above, Wilson fails to address her claim for emotional distress in her response to the summary judgment motion.

To prevail on a claim of intentional infliction of emotional distress, Texas law requires a finding of the following four elements: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme or outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) citing Dean v. Ford Motor

Credit Co., 885 F.2d 300, 306 (5th Cir. 1989)). "Outrageous" conduct is defined as conduct that surpasses "all bounds of decency" such that it is "utterly intolerable in a civilized community." Id. (*quoting* Restatement (Second) of Torts §46 cmt. d).

Even conduct which may be illegal in the employment context may not be the type of conduct which constitutes extreme and outrageous behavior. Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991). In fact, the Court in Monarch Paper Co. stated, "[M]ore is required to prove intentional infliction of emotional distress than the usual ADEA claim." Id. at 1144.

After thoroughly reviewing the pleadings and all supporting evidence filed by the parties, the Court is unable to find any evidence whatsoever to indicate any extreme or outrageous conduct by Central Freight. Other than Wilson's bare allegation of intentional infliction of emotional distress in her First Amended Complaint, the record is devoid of any

reference by her to this claim or any conduct by Central Freight which might be relevant to this claim. The mere fact that the plaintiff was terminated, regardless of whether her termination violated the ADEA, is insufficient to raise a genuine issue of material fact as to her claim for intentional infliction of emotional distress. Therefore, summary judgment is appropriate with regard to Wilson's claim for intentional infliction of emotional distress.

IV. CONCLUSION

After reviewing the motion, the response and the reply in the light most favorable to the plaintiff and resolving all reasonable doubts as to the existence of a genuine issue of material fact in favor of the plaintiff, the Court concludes that there are no genuine issues of material fact with regard to the plaintiff's claims of age discrimination and intentional infliction of emotional distress. Therefore, the Court finds that summary judgment is appropriate.

IT IS THEREFORE ORDERED that Defendant Central Freight Lines, Inc.'s Motion for Summary Judgment is hereby GRANTED.

SIGNED this 2nd day of July, 1993.

SAM B. HALL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

JEAN WILSON	§	
	§	
V.	§	NO. 2:91-CV-172
	§	
CENTRAL FREIGHT LINES, INC.	§	
	§	

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

Came on for hearing in open court on August 30, 1993, the Plaintiff's Motion for New Trial in the above-styled cause of action. After consideration of the motion, the responses and replies thereto, and the arguments of counsel, the Court finds that the motion is not well taken.

I. BACKGROUND

The plaintiff Jean Wilson alleged that she was terminated in August 1990 from her position as Office Manager of the defendant Central Freight's Longview, Texas terminal on the basis of her age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.* Wilson, age fifty-eight at the time of her discharge, also brought a

pendent state claim for intentional infliction of emotional distress. Wilson claimed that she should have been "rolled back" from her managerial (and salaried) position into a lesser, hourly position with the company. She claimed that some employees were rolled back from salaried positions into hourly positions, but that she was not similarly treated because of her age.

Central Freight denied that Wilson's age played any role in the termination decision. Central Freight contended that Wilson was terminated because the position of Office Manager was eliminated, and her duties were assumed by other employees as part of a company-wide restructuring necessitated by an economic downturn.

On July 2, 1993, the Court granted Central Freight's Motion for Summary Judgment in its entirety. Essentially, the Court determined that there was no evidence of age discrimination in the summary judgment record. Prior to the entry of the Court's order grant-

ing summary judgment, Wilson was granted several extensions of time in which to respond to Central Freight's motion; these extensions resulted in her having approximately six months in which to discover evidence and respond to the motion.

After summary judgment was entered against her, Wilson timely filed this "Motion for New Trial." This motion is properly termed a Motion to Alter or Amend pursuant to Fed. R. Civ. P. 59(e) since it was served within ten days of the rendition of judgment. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990) *petition for cert. filed*, 62 U.S.L.W. 3009 (U.S. June 24, 1993) (No. 93-1).

II. DISCUSSION

In her motion for new trial filed on July 12, 1993, the plaintiff raises two arguments in support of the motion: (1) her statistics expert opined in plaintiff's summary judgment response that the statistics revealed a pattern of age discrimination, and (2) the

Court's summary judgment order, if allowed to stand, results in "manifest injustice to Plaintiff." In the Memorandum Order granting summary judgment at pp. 9-11, the Court discussed and rejected the proffered statistical evidence because the expert's results were not based on appropriate comparisons. The Court will not address the statistical argument further.

It was not until July 19, 1993, when the plaintiff filed her Reply to Defendant's Response to Plaintiff's Motion for New Trial that she submitted affidavits of other employees who were supposedly rolled back into hourly positions. The plaintiff did not submit these affidavits during the six-month pendency of the summary judgment motion. The plaintiff claims that these affidavits establish that Central Freight's claimed policy of abolishing positions and not rolling back those salaried employees into hourly positions is untrue. The plaintiff submitted three additional affidavits in her First Supplemen-

tal Reply to Defendant's Response to Plaintiff's Motion for New Trial.

Central Freight responds that these affidavits are untimely and should be rejected by the Court. Central Freight cites Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir. 1990), *petition for cert. filed*, 62 U.S.L.W. 3009 (U.S. June 24, 1993) (No. 93-1), in which the Fifth Circuit sets forth the analytical structure for the Court's consideration of Rule 59(e) motions such as this one. Relevant portions of the Lavespere decision are as follows:

> [I]n order to reopen a case under Rule 59(e) on the basis of evidentiary materials that were not timely submitted, the mover need not first show that her default was the result of mistake, inadvertence, surprise, or excusable neglect or that the evidence is such as to show that the judgment was manifestly wrong.
>
> Because Rule 59(e) is not subject to the limitations of Rule 60(b), the district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration under the former rule. That discretion, of course, is not limitless.

> In any case in which a party seeks to upset a summary judgment on the basis of evidence she failed to introduce on time, two important judicial imperatives clash: the need to bring litigation to an end and the need to render just decisions on the basis of all the facts. (citations omitted). The task of the district court in such a case is to strike the proper balance between these competing interests. In order to do this, the court should consider, among other things, the reasons for the moving party's default, the importance of the omitted evidence to the moving party's case, whether the evidence was available to the non-movant before she responded to the summary judgment motion, and the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened. (emphasis added). Lavespere, 910 F.2d at 174.

Central Freight also cites Waltman v. Int'l Paper Co., 875 F.2d 468, 473 (5th Cir. 1989), in which the Fifth Circuit held that the plaintiff-appellant's filing of materials in support of a motion to reconsider summary judgment was not timely because the material was available to her during the pendency of the summary judgment proceedings and she gave no explanation as to why they were not filed until her motion for reconsideration. Id. at

474. The Lavespere Court noted that the Waltman decision is not inconsistent with the principles set forth in Lavespere. 910 F.2d at 174. Rather, the Lavespere Court interpreted Waltman "to indicate only that if a party is guilty of such defaults, then a district court may, without committing an abuse of discretion, refuse to admit and consider belatedly-filed evidentiary materials." Id. at 175. (emphasis in original).

After considering the four Lavespere factors, the Court finds that the plaintiff has not made a proper showing in order to reopen this case on the basis of evidence she failed to timely introduce. First, she provides absolutely no explanation as to why she delayed in submitting this evidence. The names of the affiants were provided to her by Central Freight during the discovery phase of this lawsuit. See Exs. 1 and 2 attached to the Defendant's Motion to Strike Plaintiff's First Supplemental Reply.

Regarding the second factor, the importance of the evidence, the arguments were previously raised in the original summary judgement proceeding and rejected by the Court. See Memorandum Order at 7-9.

The third Lavespere factor addresses the availability of the evidence during the pendency of the original summary judgment proceeding. As mentioned above, the names of these individuals and the information they possessed were clearly available to the plaintiff when she originally responded to the defendant's motion for summary judgment in February, 1993. The plaintiff does not dispute that this information was at her disposal although the affidavits themselves may not have been.

As to the fourth factor, prejudice against the nonmoving party, it is clear that Central Freight will be prejudiced if it is forced to try this case. However, the prejudice is minimized by the fact that the summary judgment motion was not decided until shortly before the original trial date in this case.

Therefore, the parties were likely prepared for trial at the time summary judgment was granted. Nevertheless, the prejudice weighs against granting the motion for new trial.

Finally, the Lavespere Court noted the judicial imperative of the need to bring litigation to an end. The plaintiff had more than ample opportunity to create a fact issue during the pendency of the original summary judgment motion. The Court adheres to the Eastern District's Civil Justice Expense and Delay Reduction Plan and will not permit the case to linger on the Court's docket, resulting in both increased expense and delay.

Even were the Court to consider the plaintiff's late-filed evidence to be timely filed, the Court finds that the evidence is insufficient to create a genuine issue of material fact such that the Court should alter or amend its judgment. The evidence submitted by the Plaintiff is irrelevant to the plaintiff's claim of age discrimination because it is both remote in time to the plaintiff's

termination and arose under circumstances different from the plaintiff's termination which resulted from a reduction in force.

III. CONCLUSION

Based on the above discussion, the Court finds that the plaintiff has not made a showing sufficient to persuade the Court to reopen this case. Accordingly,

IT IS THEREFORE ORDERED that the Plaintiff's Motion for New Trial is hereby DENIED.

SIGNED this 29th day of September, 1993.

SAM B. HALL, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5449

Summary Calendar

JEAN WILSON,

Plaintiff-Appellant,

v.

CENTRAL FREIGHT LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(2:91-CV-172)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Jean Wilson brought claims against Central Freight Lines, Inc., (Central) for age discrimination pursuant to 29 U.S.C. § 621 et seq. and for intentional infliction of emotional distress. The district court granted summary judgment for Central. Wilson appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1972, Wilson began working for Central, a state-wide trucking company headquartered in Waco, Texas, as an office clerk at its Longview, Texas terminal. Subsequently, Wilson became a cashier, and in 1976 Wilson was promoted to the position of office manager at the Longview terminal. As office manager, Wilson's job duties included supervision of clerical employees, preparation of credit union forms, personnel duties, assisting in the preparation of insurance forms, preparing new employee forms and termination notices, and filling in for office personnel during their lunch breaks or vacations.

Because of declining business conditions, according to Central, Wilson's position as office manager of the Longview terminal was eliminated. Central contends that when Wilson originally assumed her position of office manager in 1976 she supervised up to eleven employees. However, by August of 1990, Wilson supervised only three full-time clerical employees and one part-time employee at the Longview terminal. In response to its declining level of business, Central attempted to restructure and streamline its operations. As part of this plan, Wilson's position of office manager of the Longview terminal was eliminated. Wilson was fifty-eight years old when she was terminated.

Wilson then filed suit in federal district court alleging that age was a determining factor in Central's decision to fire her. Wilson also asserted a pendent state law claim for intentional infliction of emotional distress. Central moved for summary judgment on Wilson's claim of age discrimination and on

her claim for intentional infliction of emotional distress. Central moved for summary judgment on Wilson's claim of age discrimination and won her claim for intentional infliction of emotional distress.[2] The district court granted Central's motion.

In relation to Wilson's age discrimination claim, the district court determined that the case was a reduction in force case. The district court noted that in order for Wilson to succeed on her reduction in force case, she must establish the following prima facie elements: (1) that she was within the protected age group and that she has been adversely

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[2]In her reply to Central's motion for summary judgment, Wilson failed to address Central's assertion that she could not establish a genuine issue of material fact concerning her claim for intentional infliction of emotional distress. Because the district court determined that there was no evidence to indicate any extreme outrageous behavior on the part of Central, the district court granted Central's motion for summary judgment with regard to this claim. Wilson does not address her claim for intentional infliction of emotional distress on appeal. Therefore, Wilson has waived any argument concerning the propriety of the district court's determination.

affected, (2) that she was qualified to assume another position at the time of the discharge or demotion, and (3) that the employer intended to discriminate against her. The district court stated that the third factor was the disputed factor. In an attempt to establish the third factor of her prima facie case, Wilson had submitted two types of evidence. First, Wilson asserted that Central's past policy of dealing with business declines demonstrated that it had discriminated against her on the basis of her age. Specifically, Wilson asserted that Central's past policy concerning business declines was to lay off employees based on seniority. According to Wilson, this policy was implemented by laying off the employee with less seniority while the employee with more seniority was "rolled back" into the less senior employee's position. Pursuant to this policy, Wilson asserts that she should have been "rolled back" into the cashier position at the Longview terminal. Second, Wilson offered statistical analysis

from Dr. Sandra McCune, an assistant professor in secondary education, who stated that Central's 1990 termination decisions were not age neutral and adversely affected employees forty years or older.

The district court determined that Wilson's evidence concerning Central's past policy of rolling back a senior employee into a junior employee's position did not create a genuine issue of material fact as to whether Central discriminated against Wilson. The court pointed to the deposition of Weldon Mangham, former terminal manager of the Longview terminal, who stated that while layoffs were based on seniority, Wilson was not laid off; her position was eliminated, and, thus, she was not subject to the "roll back" policy. Further, Thomas Clowe, Jr., President and CEO of Central, stated that Central's "roll back" policy applied only to hourly employees and not to management and salaried employees.

In order to refute Central's contention that its "roll back" policy did not apply to

her, Wilson presented evidence to the district court that Central had transferred two other salaried or managerial employees to hourly positions. This evidence demonstrated that several months after Wilson was fired, two salaried and/or managerial employees were transferred instead of terminated as Wilson was. The district court did not find Wilson's evidence concerning the transfer of other employees relevant to whether Wilson was discriminated against because the other transfers occurred several months after her termination and occurred pursuant to a "transfer policy," which Central asserted was implemented subsequent to Wilson's termination, not a "roll back" policy. The district court further stated that it was not persuaded that Central's failure to fire the current cashier and replace her with Wilson created an issue of material fact concerning whether Central discriminated against her.

The district court also dismissed Dr. McCune's conclusion, based on her statistical

analysis, that Central's 1990 termination decisions were not age neutral. The district court concluded that Dr. McCune's analysis did not reveal a bias against employees over the age of forty. According to the district court, Dr. McCune's statistical analysis was not helpful because there is no comparison to the total number of employees terminated as a result of Central's reduction in force.

After reviewing the two types of evidence offered by Wilson, the district court concluded that Wilson had failed to establish a prima facie case of age discrimination. The district court then addressed, even though it acknowledged that it was unnecessary, Central's argument that summary judgment was appropriate because Wilson had not established that Central's proffered non-discriminatory reason for firing her was only a pretext for age discrimination. Because Wilson submitted essentially the same evidence to rebut Central's non-discriminatory reason for firing her.

After the district court entered judgment against her, Wilson filed a motion for a new trial. Central opposed the motion; Wilson filed a reply to Central's response. In her reply, Wilson included an affidavit not previously presented to the district court. Further, in a supplemental reply to Central's response, Wilson included two more affidavits not previously presented to the district court. At the hearing on Wilson's motion for a new trial, Wilson submitted three more previously unsubmitted affidavits. The district court granted Central's motion to strike the affidavits filed during the hearing. In its order denying Wilson's motion for a new trial, the district court determined that Wilson had not made a proper showing in order to reopen the case on the basis of new evidence. The court noted that Wilson provided no explanation concerning why she was unable to timely submit this evidence. The district court stated that this information was available before it granted Central's motion for

summary judgment; the court further concluded that even if it were to consider the evidence, it would still conclude that there was no genuine issue of material fact concerning whether Central had discriminated against Wilson on the basis of her age.

II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the same criteria used by the district court in the first instance. Conkling vs. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). First, we consult the applicable law to ascertain the material factual issues. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1486). Summary judgment is proper "if the pleadings, deposi-

tions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" FED. R. CIV. P. 56(c). In the instant case, the question before us is whether the evidence in the summary judgment record establishes a material issue of fact concerning whether Central discriminated against Wilson on the basis of her age. See Armstrong v. City of Dallas, 997 F.2d 62, 66 (5th Cir. 1993).

III. DISCUSSION

A. EVIDENTIARY REQUIREMENTS

Because age discrimination is often a difficult proposition to prove, the Supreme Court has established a procedure which allocates the burden of production and establishes an order for the presentation of proof in discrimination cases. Under the McDonnell

Douglas test,[3] the plaintiff must first establish a prima facie case of age discrimination. To establish a prima facie case of age discrimination in a reduction in force case, the plaintiff must establish that: (1) she was discharged; (2) she was qualified to assume another position at the time of her discharge; (3) she was within the protected class at the time of discharge; and (4) the employer intended to discriminate in reaching the decision at issue. Thornbrough v. Columbus and Greenville R.R. Co., 760 F.2d 633, 642 (5th Cir. 1985). The last element of the prima facie case can be established by evidence leading the factfinder "to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) that defendant regarded age as a negative factor in such consideration." Id.

---

[3]McDonnell Douglas is a Title VII case; however, the Fifth Circuit has adopted its test for use in ADEA cases. See Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 n.4 (5th Cir. 1993).

The establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. Thus, the establishment of a prima facie case places upon the defendant the burden of producing an explanation to rebut the prima facie case. Although the McDonnell Douglas presumption shifts the burden of production to the defendant, the ultimate burden of persuasion always remains with the plaintiff. Once the employer satisfies its burden of production, the presumption disappears, and the plaintiff then has "the full and fair opportunity to demonstrate" that the proffered reason was not the true reason for her discharge and that age was.

B. PROOF OF DISCRIMINATORY INTENT

We note initially that it is well settled in this circuit that the correctness of a district court's grant of summary judgment may not be determined on the basis of evidentiary material first put of record after the summary judgment is granted. E.g., Savers Fed. Sav-

ings & Loan Ass'n, 888 F.2d 1497, 1501 n.4 (5th Cir. 1989). Therefore, we will not consider any of the evidence which Wilson submitted after the district court's grant of summary judgment in favor of Central. Further, because Wilson does not brief the issue of whether the district court improperly decided not to reopen the summary judgment record and consider her new evidence, she has waived that issue on appeal. Morrison v. City of Baton Rouge, 761 F.2d 242, 244 (5th Cir. 1985).

In the instant case, Central asserts that Wilson was not discriminated against; rather, Central asserts that Wilson was terminated because of adverse economic conditions. See Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 119 (5th Cir. 1993) (termination based on adverse economic conditions is a legitimate non-discriminatory basis for terminating employee). Because we are reviewing the granting of a summary judgment, we must determine whether Wilson has created a genuine

issue of material fact as to whether Central discriminated against her on the basis of her age. In her response to Central's motion for summary judgment, Wilson asserted that the following evidence created a genuine issue of material fact: (1) Wilson asserted that after she was terminated her job duties were absorbed by younger employees,[3] (2) Wilson asserted that Central violated its "roll back" policy, (3) Wilson asserted that Central's contention that it never rolled back managerial/salaried employees to hourly positions is contradicted by the company's actions with regard to two other employees, and finally (4)

---

[3] In its memorandum opinion, the district court noted that Wilson did "not allege that new employees were hired to assume her duties. Nor does she allege that the employees who assumed her duties were less qualified than she." On appeal, Wilson attempts to assert that Central was forced to hire a younger employee because the other employees at the Longview terminal were unable to complete all of her previous duties by themselves. However, this evidence concerning the new hire was only brought out in the evidence which Wilson attempted to introduce subsequent to the district court's decision to grant summary judgment for Central. Therefore, we will not consider it.

Wilson asserted that statistical evidence established that Central discriminated against her on the basis of her age.

As we emphasized in Bodenheimer, the Supreme Court in St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), established that the plaintiff must do more than merely assert evidence negating an employer's defense; rather, the employee must introduce evidence demonstrating that the employer's proffered reasons were a pretext for age discrimination. Bodenheimer, 5 F.3d at 958-59 & n.8; see also Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 298 n. 22 (5th Cir. 1994). In this case, we do not believe that Wilson has established a genuine issue of material fact that she was discriminated against because of her age. Wilson's evidence concerning the two other employees that were transferred does create a fact issue concerning whether Central's position that it never "rolled back" or transferred salaried employees was necessarily correct. However, because

there is no evidence concerning the age of these two employees, the evidence is not particularly probative of whether Central discriminated against Wilson on the account of her age.

We further conclude that the statistical analysis offered by Dr. McCune does not help Wilson establish a genuine issue of material fact. Dr. McCune conducted two different comparisons to analyze whether Central's reduction in force actions in 1990 were age neutral. First, Dr. McCune took the number of employees involuntarily terminated in 1990 and divided the employees into two separate categories. In the first category were employees involuntary terminated based on a reduction in force or end of assignment; in the second category were employees terminated based on the employee's behavior or health. Dr. McCune further divided the employees into two age groupings, i.e., over and under forty. Thus, for example, Dr. McCune's table set forth the total number of employees over forty terminat-

ed as a result of the reduction in force or end of assignment. Dr. McCune determined that 52.83% of all of the over forty employees terminated in 1990 were terminated pursuant to Central's reduction in force or end of assignment. Also, Dr. McCune determined that 26.74% of all of the under forty employees terminated in 1990 were terminated pursuant to Central's reduction in force or end of assignment. Dr. McCune concluded that "there exists a significant difference between the proportion of employees age 40 years or older involuntarily terminated as a reduction in force or end of assignment [by Central] in 1990 and the proportion of employees under age 40 involuntarily terminated as a reduction in force or end of assignment."

Dr. McCune's next comparison further subdivided the employees terminated pursuant to Central's reduction in force into the categories of (1) full-time employees and/or employees with at least ten years experience and (2) extra or part-time employees with less

than ten years of service. Dr. McCune determined that 67.86% of the over forty employees terminated by Central as a reduction in force or end of assignment were full-time employees or employees with ten years or more of service. Dr. McCune also determined that 20% of the under forty employees terminated by Central as a reduction in force or end of assignment were full-time employees or employees with ten years or more of service. According to Dr. McCune,

> there exists a significant difference between the proportion of employees age 40 years who were full time employees or employees with 10 years or more of service that were involuntarily terminated as a reduction in force or end of assignment [by Central] and the proportion of employees under age 40 who were full time employees or employees with 10 years or more of service that were involuntarily terminated as a reduction in force or end of assignment [by Central].

The district court determined that Dr. McCune's statistical analysis did not create a genuine issue of material fact as to whether Wilson was terminated by Central on the account of Wilson's age. First, the district

court noted that Dr. McCune had conceded that 64.1% of the total number of employees discharged as a result of the reduction in force were under forty. Employees under forty represented 58% of the total work force. The court noted that these numbers did not reveal any bias or discrimination against employees over forty; rather, if anything, the numbers indicated a bias against employees under the age of forty.

The district court then specifically addressed the comparisons utilized by Dr. McCune to reach her conclusions. Concerning Dr. McCune's first comparison, the district court stated that it failed

> to see the relevance of Dr. McCune's percentages and resulting conclusion because there is no comparison to the total number of employees terminated as a result of the [reduction in force]. . . . The court finds that Dr. McCune's comparisons of termination reasons within age groups are not helpful in determining whether employees over age forty were disproportionately affected.

Similarly, the district court did not find Dr. McCune's second comparison to be persuasive

because the court believed that Dr. McCune had arbitrarily classified employees according to their years of employment and part-time or full-time status with Central. The district court believed that these classifications skewed the statistical analysis.

We agree with the district court that Dr. McCune's statistical analysis did not create a genuine issue of material fact regarding whether Central discriminated against Wilson on the basis of her age. We note that particularly in age discrimination cases statistics are easily manipulated and may be deceptive. See Walther v. Lone Star Gas Co., 952 F.2d 119, 124 (5th Cir. 1992). The fact that statistics may be deceptive in an age discrimination case is easily demonstrated in this case. The same numbers which Dr. McCune utilized in determining that Central's 1991 reduction in force decisions were not age neutral also demonstrate that of the employees terminated in 1991 pursuant to Central's reduction in force 64.1% were under forty

while under forty employees represented only 58% of the total work force. While we are unwilling to say that Dr. McCune's statistical analysis is not probative at all as to Central's motivation in terminating Wilson, we do not believe that the statistical evidence would be sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. Therefore, we conclude that the evidence which Wilson states supports her claim is insufficient for a reasonable jury to return a verdict for her as a matter of law. Thus, we conclude that the district court did not err in granting Central's motion for summary judgment.

IV.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment on Wilson's claims of age discrimination and intentional infliction of emotional distress.

CENTRAL FREIGHT LINES, INC.

Notification To All Employees
Position Opening

POSITION: OFFICE SUPERVISOR

LOCATION: LONGVIEW

REPLACEMENT _____ YES _____ ADDITION

SALARY GRADE: 06

All opening positions posted for bid will be awarded according to past service performance, ability, attendance, and continuous service with the company.

This notice will be posted for seven consecutive days, during which time employees will have the opportunity to bid for the position. Please read the Position Specifications posted and if you wish to apply for the position, a Job Bid Form must be received by the Human Resource Department in Houston, Texas by:

TUESDAY SEPTEMBER 28, 1993 3:00 P.M.

Please send resume to:

HUMAN RESOURCES DEPARTMENT

HOUSTON, TEXAS

Job Bid Forms and Resume outlines are available from the Human Resource office and the Terminal Manager.

Central Freight Lines Incorporated is an equal opportunity employer and herein reiterates its policy of equal opportunity and advancement opportunity for all qualified individuals without distinction or discrimination because of race, color, sex, religion, age or national origin.

SEND TO: Human Resources Department

Houston, Texas September 1993

I wish to be considered for the job of: Office Supervisor Longview

I am now employed by Central in _____ (Terminal)

My date of employment is _____

My present job classification is _____

My Social Security Number is _____

My current benefit hours are _____Hrs. per pay period

My current rate of pay is $_____/_____ per hour/pay period

_____

Employee's Signature

RESUME OUTLINES SHOULD BE HANDWRITTEN AND INCLUDE:

1. Name, address and telephone number.
2. Education: (Starting with high school, dates attended, teams, clubs, organizations, offices, honors, special courses and seminars).
3. Military Experience: (rank, responsibility, special training and dates.
4. Work Experience: (start with your present position and give dates of employment, title, responsibilities and reason for leaving previous employment.)
5. List professional, civic and social organizations and offices held.
6. A written statement on "Why you want the position and what your qualifications are for the position".
7. Any other information you may wish to submit.

8. List your present and previous immediate Central supervisors and terminal location for the past three years with permission statement to contact your present and previous supervisors.

9. Do you have a Class A Commercial License and current D.O.T. card?

JOB TITLE: OFFICE SUPERVISOR

DEPARTMENT: LONGVIEW

SALARY GRADE: 06

REPLACEMENT: YES

QUALIFICATIONS:

1. Must exhibit a high degree of judgement in setting priorities and task application.
2. Must be able to communicate at all levels of the organization both written and orally.
3. Must have displayed a high degree of professionalism in their previous positions.
4. Must have (2) three years office administration with operational knowledge.

DUTIES & RESPONSIBILITIES

1. Responsible for the administration of Customer Service Dept., Cashier Dept., Rate Dept., and Dock OS&D.
2. Responsible and accountable for all monies received.
3. Encourage professional attitude toward office objectives.
4. Responsible for coordinating computer activities with Information Systems Dept., Waco General Office.
5. Responsible for all office reports, correspondence and their distribution.
6. Responsible for coordinating the activities of the office with all other departments.
7. Other duties as assigned.

Qualified and interested persons should submit their resume to the Human Resources Dept., Houston Terminal, no later than

3:00 P.M., TUESDAY, SEPTEMBER 28, 1993

Central Freight Lines, Inc., is an equal opportunity employer and herein reiterates its

policy of equal opportunity and advancement opportunity for all qualified individuals without distinction or discrimination because of race, color, sex, religion, age or national origin.

CENTRAL FREIGHT LINES INC.

SALARIED JOB OPENINGS

JOB TITLE OFFICE SUPERVISOR	
STATUS FT X PT Extra Temp New Position JOB CODE CO3 No. Positions ___ Replacement _____	SALARY GRADE _____ 24,592. Min. REQUISITION NO. 4800 002
HIRING SUPERVISOR Marty Morris	LOCATION/DEPARTMENT Longview - Office

JOB DUTIES:

* Supervise office personnel.
* Interview and hire applicants for office.
* Train employees.

* Assist with tracing, customer service, rate calls, and credit union applications.
* Maintain personnel files.
* Handle on-the-job injury paperwork.
* Order office supplies.
* Answer questions of employees concerning benefits.
* Perform all correspondence for terminal manager.
* Assist employees in filing insurance.
* Organize and record all invoices received for expenditures and set up for approval by terminal manager.
* Sort and distribute company and U. S. mail.

MINIMUM QUALIFICATIONS:
Must have working knowledge and understanding of electrical typewriters, scheduling and the basic accounting principles. Must have a minimum of 1-2 years job related experience.
TECHNICAL/SPECIAL SKILLS REQUIRED:
Computer, typewriter, calculator
PREFERRED QUALIFICATIONS:
None

* Applications for posted positions must be forwarded to the Human Resources Department at Houston within 7 days after the above posted date.

Only employees who are not in corrective action or on written warning for attendance may apply. For driving positions, applicant must have a good driving record.

SUPREME COURT, U.S.
FILED
OCT 26 1994
CLERK

No. 94-740

In The

Supreme Court of the United States

October Term, 1994

JEAN WILSON,

Petitioner,

v.

CENTRAL FREIGHT LINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

31 pp

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner Wilson ("Wilson") failed to establish a prima facie case of age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634?

2. Whether the District Court and Fifth Circuit Court of Appeals correctly found that Wilson failed to produce competent summary judgment evidence upon which a reasonable finding could be made that Respondent Central Freight Lines, Inc.'s stated reason for eliminating Wilson's position is a pretext for age discrimination?

3. Whether the Fifth Circuit Court of Appeals correctly determined that Wilson waived any right to challenge the District Court's considerable discretion to exclude her belated summary judgment evidence?

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No. 94-740

In The

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October Term, 1994

JEAN WILSON,

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CENTRAL FREIGHT LINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent, Central Freight Lines, Inc. ("Central" or the "Company"), requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition") filed by Jean Wilson ("Wilson").

This case involves Wilson's failure to demonstrate that Central's nondiscriminatory business reason for eliminating her Office Manager position was a pretext for age discrimination. The Petition should be denied because: (i) Wilson failed to establish a prima facie case of age discrimination under the ADEA; (ii) the lower courts correctly determined that Wilson failed to produce any

evidence that Central contrived its nondiscriminatory business reason and that her age was the real reason for her job elimination; and (iii) the Fifth Circuit Court of Appeals properly determined that Wilson waived any right to challenge the District Court's considerable discretion to exclude her late-filed summary judgment evidence. Plainly, the Fifth Circuit's decision does not conflict with decisions from other circuit courts, nor is there any issue of national importance involved in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals, the District Court's opinion granting Central's Motion for Summary Judgment, and the District Court's order denying Wilson's Motion for New Trial are reproduced at Appendix 1 of the Petition.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on June 21, 1994. Wilson invokes this Court's jurisdiction under 28 U.S.C. § 1254(i).

STATUTORY PROVISIONS

The statute at issue in this case is the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), which provides in relevant part:

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

and § 631(a), which states:

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

STATEMENT OF THE CASE

Wilson worked as the Office Manager at Central's Longview, Texas terminal. On August 24, 1990, Central eliminated her job. Wilson filed suit on December 6, 1991, claiming that she was discharged because of her age in violation of the ADEA, 29 U.S.C. §§ 621-634. Central denied that Wilson's age played any role in the Company's decision to eliminate her position. Rather, as Central has maintained all along, Wilson was let go as part of an economically motivated job elimination.

A. Proceedings Below.

After considerable time for discovery, Central filed its Motion for Summary Judgment in late October 1992, contending that Wilson could not raise a triable issue of fact on each element of her age discrimination claim. Wilson received three extensions of time to respond to the dispositive motion, filing her response on February 16, 1993. In its reply to Wilson's response, Central demonstrated that Wilson had failed to present any evidence

that the Company's economic reason for eliminating her position was false and that her age was the real reason for her discharge. Central also demonstrated that Wilson's so-called "statistical" evidence was unreliable and irrelevant.

Agreeing with Central's position, the District Court granted the Company's summary judgment motion and concluded that Wilson failed to produce competent evidence to support the prima facie case and pretext for discrimination elements of her claim. (Dist. Ct. op. at 3-12).[1] The District Court rejected Wilson's two categories of summary judgment evidence, reasoning that (i) Central did not apply its layoff by seniority or "roll back" policy in favor of younger co-workers and (ii) Wilson's statistical evidence did not raise any inference of age discrimination. (*Id.* at 7-12).

Dissatisfied with the District Court's decision, Wilson filed a "Motion for New Trial," contending that her expert's opinion raised a triable issue of fact. After Central filed its response to the new trial motion, Wilson, *for the first time*, attempted to introduce seven belated affidavits ("Belated Affidavits") from former co-workers.[2]

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[1] References to the district court's unpublished memorandum opinion, as reproduced in Petitioner's Appendix 1, are denoted by the abbreviation "Dist. Ct. op.," followed by the page number in the memorandum opinion.

[2] Wilson's attempt to slip new evidence into the record is appalling. She began filing the Belated Affidavits *after* she filed her new trial motion. She submitted the affidavits with her Reply to Defendant's Response to Plaintiff's Motion for New Trial. Wilson also attempted to file three more affidavits at the August 30, 1993 hearing on her new trial motion, and one more

Central moved to strike the Belated Affidavits. At the August 30, 1993 hearing on Wilson's new trial motion, the District Court granted Central's motion to strike three of the affidavits that were submitted for the first time at the hearing. Likewise, in a separate order denying Wilson's new trial motion, the District Court concluded that it would not reopen the summary judgment record and consider the remaining Belated Affidavits. In the District Court's view, the information in the Belated Affidavits was available to Wilson long before the summary judgment pleadings had closed. Alternatively, the District Court concluded that even if it had considered the Belated Affidavits, the evidence was insufficient to raise any inference of age discrimination – the evidence was irrelevant to Wilson's claim, remote in time, and arose under circumstances different from her discharge.

B. Statement Of Facts.

The facts of this case are set out succinctly and accurately in the Fifth Circuit's opinion. (Ct. App. op. at 2).[3] By stark contrast, the prolonged statement of facts on pages 6-24 of the Petition contains numerous statements that are immaterial, that distort the summary judgment record, and that are not properly part of the record.

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after the hearing. In yet another effort at deception, she has now attempted to submit a "job posting" dated after the Fifth Circuit issued its opinion in this case. *See* Appendix 2 to the Petition.

[3] References to the Fifth Circuit's unpublished opinion, as reproduced in Appendix 1 of the Petition, are denoted by the abbreviation "Ct. App. op.," followed by the page number.

Rather than burden the Court by repeating all the material, uncontroverted facts in the summary judgment record, Central recounts the essential facts pertinent to the lower courts' decisions.[4]

The Parties

Central is a trucking company headquartered in Waco, Texas. The Company operates approximately 73 terminals across Texas, Oklahoma, New Mexico, Arkansas and Tennessee. In 1972, Wilson began work with Central as an Office Clerk at its Longview, Texas terminal. She later became a Cashier, checking in drivers and receiving paper work and payments from Central's customers. A few years later, Central promoted Wilson to the Office Manager position at the Longview terminal. In that position, she supervised the terminal's clerical employees and prepared credit union forms. She also performed personnel duties, such as preparing equal employment opportunity summaries, assisting the terminal employees in submitting insurance forms, preparing new employee forms and termination notices, and filling in for office employees during their lunch breaks and vacations.

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[4] Wilson's "fact statement" and other sections of her brief contain information derived largely from the Belated Affidavits and "job postings" – evidence that was *never* part of the summary judgment record in the courts below. *See, e.g.*, Petition at 9-10, 12-24, 32-33, 38-39, 51-52, 63 and Appendix 2 (attaching and restating information in 1993 and 1994 "job postings" – *documents that were never part of the record on appeal*).

Decline In Business At The Longview Terminal

Central's level of business declined significantly in the late 1980's. In addition to increased competition, levels of freight declined substantially and, in turn, Central's economic position suffered dramatically. At the same time, Wilson's supervisory responsibilities were affected by the downturn in demand for Central's services. When Wilson assumed the Office Manager role, she supervised up to eleven office employees. However, when Central eliminated Wilson's job in August 1990, the Longview terminal had only three full-time clerical employees and one part-time employee. After Central let Wilson go, the Longview terminal had only three full-time clerical employees.

Decision To Eliminate Wilson's Position

To address the declining business conditions, Central adopted a plan to restructure and streamline its operations. As an integral part of that plan, Central eliminated various positions where the remaining management and staff could effectively assume additional responsibilities. The majority of position eliminations and restructuring occurred at Central's corporate office in Waco, Texas. Several of the Company's larger terminals, such as Dallas and Houston, also experienced substantial reductions and restructuring. Mid-size terminals, such as the one in Longview, were affected by the restructuring based on the specific circumstances at each terminal.

In August 1990, Central decided to abolish the Longview terminal's Office Manager position. At that time, the

other management employees at the terminal were Weldon Mangham, Terminal Manager, and M.L. Morris, Assistant Terminal Manager. Central's decision to eliminate the Office Manager position was based on several factors. First, terminal management was substantially overstaffed. In the early 1980's, Wilson supervised as many as 11 office employees. By 1990, however, that number had declined to three full-time and one part-time office clerical. Second, Central knew that Mangham, the Longview Terminal Manager, intended to retire at the end of 1990; therefore, Morris was needed to assume the Terminal Manager position. Given the decline in workload and substantial decrease in office staff and other personnel, Central determined that Morris could assume all management responsibilities at the Longview terminal.

Elimination of Wilson's Position

On August 24, 1990, Central eliminated the Longview terminal's Office Manager position. Weldon Mangham informed Wilson about her discharge in a private meeting in Mangham's office. Central did not have any available job openings at the terminal when it eliminated Wilson's job. Specifically, the Cashier position was not vacant when Central eliminated Wilson's position. Nancy Goode was employed as the Cashier and had been so employed for over three years. Mangham retired in December 1990 and, at that time, Morris became the Terminal Manager and performed all management duties at the Longview terminal. When Morris assumed the Terminal Manager duties, Central also eliminated the Longview Assistant Terminal Manager position.

Layoffs By Seniority

Central applied layoffs by seniority to rank and file hourly employees such as dockworkers and drivers. By comparison, when eliminating a salaried manager's position, particularly where there was only one incumbent in the position, the Company did not apply seniority or bumping rights. Central's layoff by seniority policy did not apply to the *elimination* of a job position. Wilson was not laid off. Her position was eliminated and, as a result, she was terminated from employment.

Things changed in 1991. Central implemented a new transfer policy and, under that policy, the Company transferred one individual who was the sole employee at the Bonham, Texas terminal (classified as the Bonham Terminal Manager) to an hourly position. During the same year, Central also transferred a dock trainer at the Dallas terminal to the Sulphur Springs terminal as a dock loader. Wilson did not offer any evidence regarding the ages of the two transferred employees.

REASONS FOR DENYING THE WRIT

This case should not be heard. No "special and important reasons" exist for exercising the Court's discretion to review the Fifth Circuit's decision. Sup. Ct. R. 10.1 (West 1994). The courts below fully considered the summary judgment evidence and correctly decided that a jury could not reasonably have found that Central fabricated its reason for eliminating Wilson's position and that her age was the real reason for her discharge. The Petition represents Wilson's desperate attempt to rely on belated

summary judgment evidence – none of which was properly a part of the summary judgment record in the courts below. Before the Fifth Circuit, Wilson did not challenge the District Court's considerable discretion to exclude the seven Belated Affidavits she filed *after* the District Court had granted Central's summary judgment motion. The Fifth Circuit's decision raises no conflict among the courts of appeals, and the Petition does not raise important issues of federal law or public policy warranting this Court's plenary attention.

I. THE FIFTH CIRCUIT PROPERLY APPLIED *ST. MARY'S HONOR CENTER v. HICKS* IN THE SUMMARY JUDGMENT CONTEXT

In a tribute to conclusory reasoning, Wilson asserts that the Fifth Circuit misapplied this Court's decision in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). (Petition at 3). Wilson offers no explanation for her global conclusion. Rather, on pages 25-65 of the Petition, she simply repeats her disjointed and verbose arguments already rejected by the courts below. (Petition at 25-65). Wilson presents no compelling rationale for granting a writ of certiorari.

A. Wilson Failed To Establish A Prima Facie Case.

Despite Wilson's failure to offer any reasoned explanation for this Court to exercise discretionary review, Central responds to the scattered points raised in the Petition. Initially, Wilson ignores her threshold burden to establish a prima facie case of age discrimination in the

job elimination context. In *Hicks*, this Court refined and clarified the burdens of proof in a discrimination case. These burdens are:

- Plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination.

- If the plaintiff succeeds in proving a prima facie case, the defendant must *articulate* some legitimate, nondiscriminatory reason for the employee's discharge.

- If the defendant can articulate a nondiscriminatory reason for its adverse employment action, then the presumption raised by the prima facie case disappears and plaintiff must prove *both* that the nondiscriminatory reason *was false, and that discrimination was the real reason.*

Id. at 2747-49, 2751-53 & n.4 (emphasis added). *See also Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973). Wilson's ultimate burden of proving intentional age discrimination remains with her at all times and never shifts to Central. *Hicks*, 113 S. Ct. at 2747-48; *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993) (liability depends on whether age actually motivated the employer's decision).

Wilson does not challenge the Fifth Circuit's three-part test for establishing a prima facie case in a job elimination case. Under this test, Wilson must prove three elements: (i) she was within the protected class and was

discharged; (ii) she was qualified to assume another position at the time of her discharge; and (iii) there is evidence from which a factfinder might reasonably conclude that Central, in reaching its conclusion, intended to discriminate against Wilson on account of her age. *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1314-15 (5th Cir. 1986). Regarding the third element, the Fifth Circuit requires evidence from which a factfinder might reasonably conclude that the employer consciously refused to consider retaining or relocating the plaintiff because of her age, or that the employer regarded her age as a negative factor in its consideration. *Williams*, 656 F.2d at 130.

Wilson failed to produce any evidence of discriminatory treatment to satisfy the third element of her prima facie case. As the lower courts correctly observed, Wilson was never replaced by a younger person, nor could she present any admissible evidence showing that Central treated her less favorably than younger persons in similar job positions. (Dist. Ct. op. at 6-7, 11-12; Ct. App. op. at 10). Since Wilson failed to establish a prima facie case of age discrimination, this Court need not reach any of the "pretext" issues raised in the Petition. Thus, the Petition should be denied.

B. Wilson Misinterprets Her Pretext For Discrimination Burden.

Nevertheless, even if Wilson could have cleared her prima facie case hurdle, the lower courts properly concluded that she could not dodge the "pretext for discrimination" element of her claim. An employer's burden to

rebut a prima facie case under the ADEA is slight. The employer must produce some evidence that the employee was terminated for a nondiscriminatory reason. *Hicks*, 113 S. Ct. at 2747; *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. The employer "need not persuade the court that it was actually motivated by [its] proffered reasons," *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094, nor must it prove the "absence of a discriminatory motive." *Board of Trustees v. Sweeney*, 439 U.S. 24, 25, 99 S. Ct. 295 (1978). *See also Hicks*, 113 S. Ct. at 2749 (prima facie presumption "simply drops out of the picture" once employer articulates nondiscriminatory explanation).

Central easily cleared this impediment by articulating a nondiscriminatory business reason for eliminating Wilson's Office Manager position. After a dramatic decline in business caused by adverse market conditions, Central concluded that it no longer needed an Office Manager at the Longview terminal. Central determined that Wilson's managerial duties could be assumed by the Assistant Terminal Manager and Terminal Manager. Given Central's stated nondiscriminatory reason, Wilson was required to produce competent evidence that the stated reason was a pretext for age discrimination. Wilson, however, could not overcome this insurmountable obstacle to her claim.

The Pretext For Discrimination Analysis

In *Hicks*, this Court stated that once the defendant-employer has *articulated* a nondiscriminatory reason for its adverse employment action (here, the job elimination),

the plaintiff-employee must prove *both* that the non-discriminatory reason was false, *and* that discrimination was the real reason. *Id.* at 2747-49, 2751-53 & n.4. The holding in *Hicks* is abundantly clear – discrimination plaintiffs are not entitled to judgment as a matter of law if they prove that a defendant's articulated reason for an employment practice is untrue. 113 S. Ct. at 2749. The Fifth Circuit applied this uncomplicated analysis in the summary judgment context and this Court's decision needs no clarification. (Ct. App. op. at 10-11). Far from eliminating confusion, a grant of certiorari in this case would actually engender uncertainty that presently does not exist.

Wilson Relies Solely On Dictum From The Hicks Decision

Wilson's Petition creates confusion. Relying on *Hicks*, Wilson asserts that she need only cast doubt on the credibility of Central's stated reason for her discharge to raise a triable issue on her age discrimination claim. (Petition at 34, 53). She misreads the *Hicks* decision. Wilson's argument about this Court's intent focuses on a passage that is dictum to the actual decision in *Hicks*, and the inference she manufactures and draws from the passage distorts the Court's actual holding. That passage reads:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

Hicks, 113 S. Ct. at 2749.

This isolated passage offers no hope for Wilson's age discrimination claim. First, the passage is dictum because it does not bear directly on the precise issue then before the Court: whether a plaintiff automatically wins by proving the falsity of an employer's asserted reasons for its actions. Second, Wilson's analysis of the passage is taken out of context. The passage does not support Wilson's strained conclusion that a genuine issue for trial under the ADEA exists whenever the plaintiff establishes a prima facie case and then counters the employer's stated reason for discharge with non-credible assertions. (Petition at 34, 53). When read together with the remainder of the opinion, the quoted passage merely states that, in limited cases where the employer's stated reasons are obviously contrived, not simply incorrect or unwise, a plaintiff's evidence of pretext may combine with her prima facie case to permit the factfinder to infer intentional discrimination. While this may be enough to support a pro-plaintiff judgment, there must necessarily be a finding of discrimination. *See Hicks*, 113 S. Ct. at 2749 n.4.

In Wilson's haste to manufacture confusion regarding the scope of this Court's holding in *Hicks*, she overlooks a significant, coordinate passage from the decision – a passage which effectively blunts her argument that discrediting the employer's reason entitles her to a jury trial:

> [T]here is nothing whatever inconsistent between this statement [that rejection of a defendant's reasons permits the inference of discrimination] with our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *dis*believe the employer," *infra*, at

> 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

113 S. Ct. at 2749 n.4 (emphases in original).

A complete reading of the *Hicks* opinion buttresses the Fifth Circuit's conclusion that Wilson must demonstrate triable issues of both pretext and discrimination before proceeding to trial. *See Bodenheimer v. PPG Indus.*, 5 F.3d 955, 957-59 (5th Cir. 1993) (holding that plaintiff must raise triable issue that stated reason was pretext for age discrimination). *See also Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994) (same); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 843 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994) (same). The *Hicks* majority admonished that a "reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." 113 S. Ct. at 2752 (emphasis in original); *see also id.* at 2754 ("it is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.") (emphasis in original).

Further, the *Hicks* majority cast doubt on the validity of dicta in *Burdine* which indicated that a plaintiff could prove discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence." 113 S. Ct. at 2752 (citing *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981)). Referencing numerous inconsistencies between this statement and other Supreme Court pronouncements in *Burdine* and elsewhere, this Court concluded

"that the dictum at issue here must be regarded as an inadvertence, to the extent it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent." *Id.* at 2753. As a result, Wilson could have bolstered any proffered evidence of age discrimination by demonstrating that Central's reasons were unworthy of credence, but, at the end of the day, she was required to produce some proof (circumstantial or direct) of discrimination. *See id.* at 2749 n.4 ("even though [as we say here] rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*") (emphasis in original). As the lower courts properly determined, Wilson came up short.

In summary, by allowing a plaintiff to proceed to trial without raising a genuine issue of material fact regarding the ultimate question of discrimination would, in effect, treat discrimination differently from other cases involving ultimate questions of fact. This rationale would permit disproof of a defendant's reasons to suffice as an independent means of proving discriminatory intent – precisely what the *Hicks* Court rejected. Therefore, the Fifth Circuit properly applied *Hicks* in the summary judgment context. (*See* Ct. App. op. at 10-11).

C. The Fifth Circuit's Decision Does Not Conflict With The Application Of *Hicks* In Other Circuits.

Without any explanation, Wilson also contends that the Fifth Circuit's application of *Hicks* "directly conflicts with five other Circuit Courts." (Petition at 3). She does

not bother to explain how the decisions conflict with one another – apparently leaving that task to the Court's imagination. The so-called "conflict" is illusory.

As the *Hicks* court aptly explained, in the pretext phase of the burden-allocation scheme, Wilson must produce competent evidence that Central's articulated reason was contrived to mask age discrimination, not merely mistaken or unreasonable decisions. She has failed to do so. The decisions cited by Wilson are not to the contrary. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 141-42 (2d Cir. 1993) (concluding that *Hicks* did not impact the case because plaintiff introduced direct evidence of retaliation); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170 (2d Cir. 1993) (reiterating the *Hicks* "pretext for discrimination" analysis and concluding that application of ADEA to particular facts did not pose serious risk of violating Establishment Clause of the First Amendment to U.S. Constitution); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513-14 (7th Cir. 1993) (holding that there was sufficient evidence to support jury's conclusion that Transit Authority had custom or policy of terminating white per diems, and that plaintiff was terminated on account of his race); *Washington v. Garrett*, 10 F.3d 1421, 1533-34 (9th Cir. 1993) (noting that plaintiff had presented sufficient evidence that similarly situated white persons were treated more favorably and some direct evidence of race discrimination); *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 920-21 (11th Cir. 1993) (noting that plaintiff produced sufficient evidence to establish "causal nexus" element on ADEA retaliation claim).

II. THE LOWER COURTS' DECISIONS ARE CONSISTENT WITH THE HOLDING AND DICTA IN *HICKS*

In her final argument to support the Petition, Wilson maintains, again without any explanation, that the Fifth Circuit has "departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Petition at 5). Her rhetoric is meaningless. Wilson does not point to any aspect of the opinion where the Court of Appeals departed from the "accepted and usual course of judicial proceedings." As the Fifth Circuit properly concluded, *Wilson* departed from well-recognized summary judgment principles by attempting to rely on Belated Affidavits *after* the District Court granted Central's summary judgment motion. (Ct. App. op. at 9).

The Fifth Circuit also concluded that Wilson did not challenge the District Court's considerable discretion to exclude the Belated Affidavits. *Id.* Since Wilson's late-filed evidence was properly excluded, and she failed to challenge the District Court's considerable discretion to exclude the evidence, she cannot challenge that decision for the first time before this Court. *See EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 25, 106 S. Ct. 1678, 1681 (1986) (Supreme Court will not address issues not raised in the Court of Appeals).[5]

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[5] *See, e.g.*, Petition at 9-10 (referencing office manager at a different location as "much younger" than Wilson and a "younger replacement" for Wilson), and 12-24 (restating testimony in belated affidavits and job postings). Wilson also refers to the excluded evidence in the "summary of argument" and "argument" sections of the Petition. *See, e.g.*, Petition at 25-26,

In the end, Wilson's only "evidence" to buttress her age discrimination claim was:

- Central did not apply its "layoff by seniority" policy to allow her to "roll back" to the Cashier position at the Longview terminal.
- Her expert's statistical evidence.

Alone or in combination, Wilson's so-called "evidence" did not entitle her to a jury trial.

A. Wilson Failed To Raise A Triable Issue Based On Central's Application Of Its "Roll Back" Policy.

Rejecting Wilson's age discrimination claim, the lower courts correctly concluded that she failed to produce any evidence that Central contrived its non-discriminatory business reason for eliminating her job and that her age was the real reason for her discharge. (Dist. Ct. op. at 7-12; Ct. App. op. at 9-11). According to Wilson, Central's past policy for dealing with business declines was to lay off employees based on seniority and to "roll back" senior employees into positions previously held by employees with less seniority. Applying that analysis, Wilson asserted that she should have been "rolled back" to the Cashier position and that she was not

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32-33, 36-38, 51-53, and 63). Likewise, Wilson attempts to deceive this Court by trying to slip new evidence into the record. She now attaches to the Petition a July 21, 1994 job posting that was not part of the summary judgment record before the lower courts. *See* Petition, Appendix 2. This type of conduct by Wilson's attorney is sanctionable and represents counsel's futile attempt to avoid a result he does not like.

a beneficiary of Central's roll-back policy because of her age. The lower courts appropriately rejected that argument, reasoning that Central's refusal to apply the policy to Wilson was not a pretext for age discrimination. (Dist. Ct. op. at 7-9; Ct. App. op. at 11).

First, Weldon Mangham, the Longview Terminal Manager, distinguished Wilson's job elimination from the circumstances involving past layoffs at Central. Wilson's position was totally eliminated and, as a result, her job elimination was not subject to the roll-back policy. Wilson ignores this distinction and makes the unsupported assertion that her job elimination was somehow a pretext for a "layoff." Mangham, however, clearly distinguished a job elimination from a layoff – only a layoff triggered any "roll-back" based on seniority.

Second, Wilson asserted that Central has taken three different positions concerning application of the "roll-back" policy. She is seriously mistaken. Central's uncontested summary judgment evidence demonstrated that layoffs by seniority only applied by job classification to hourly employees, not to management and salaried employees. Wilson, however, claims that Central transferred salaried and managerial employees to hourly positions. She misreads the uncontested facts. Central transferred two employees under a new transfer policy implemented in 1991 – the year *after* Wilson's termination. The District Court correctly concluded that the two transfers were not relevant to Wilson's claim because they occurred several months, if not longer, after her discharge, and they occurred under a transfer policy, not a layoff or workforce reduction policy. Consistent with Central's position throughout this case, the Company did

not "roll back" managerial employees into hourly positions during the 1990 reorganization that affected Wilson.

In any event, the Fifth Circuit properly determined that Wilson proffered no evidence concerning the ages of the two transferred employees; thus, her evidence is "not particularly probative of whether Central discriminated against Wilson on account of her age." (Ct. App. op. at 11). The lower courts correctly reasoned that Wilson's "layoff by seniority" argument failed to raise any triable issue on her age discrimination claim.

B. The Lower Courts Properly Concluded That Wilson's Statistical Evidence Failed To Raise Any Inference Of Discrimination.

Wilson also relied on unreliable and irrelevant "statistics" to support her age discrimination claim.[6] The lower courts properly concluded that the statistical analysis by Wilson's expert did not raise any inference of age discrimination. (Dist. Ct. op. at 9-11; Ct. App. op. at 11-14). Since the Petition simply repeats the statistical

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[6] In her summary judgment response, Wilson referenced the "disparate impact" theory of discrimination; however, she never asserted a separate disparate impact claim in her Amended Complaint. She used the "statistical" evidence solely to support her disparate treatment claim. Moreover, Wilson never identified "any facially neutral practice" that had an adverse impact on older workers. Significantly, this Court has not recognized the disparate impact theory in an age discrimination case. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993); *Hiatt v. Union Pac. R.R. Co.*, Nos. 93-CV-0209-B, 93-CV-0210-B, 1994 WL 410107, *13-15 (D. Wyo. Aug. 3, 1994) (refusing to apply disparate impact theory to ADEA case).

arguments already rejected by the courts below, Central will not burden this Court with further argument. (*See* Petition at 56-64).

CONCLUSION

Wilson's Petition contains a conspicuous void: she did not mention the District Court's exercise of its considerable discretion to exclude her Belated Affidavits from the summary judgment record. Instead, she hoped to slip the inadmissible evidence by this Court. She failed.

Wilson had over ten months to conduct discovery and had obtained three extensions of time to submit her summary judgment response, yet she failed to proffer any probative evidence of age discrimination. Wilson's deceptive attempt to rely on excluded evidence reveals the baseless nature of her age discrimination claim. Additionally, the courts below appropriately concluded that Wilson failed to present any evidence to raise a triable issue on the prima facie case and pretext elements of her age discrimination claim. In a futile effort to cling to a metaphor, Wilson asks this Court to find a "thin vapor" of age discrimination emanating from her "evidence," yet she fails to reveal even a whiff of discrimination floating in the air.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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